Teoh Kiang Hong v Theow Say Kow @ Teoh Kiang Seng, Henry

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-23–04 OF 2021(P), 02(f)-24–04 OF 2021(P), 02(f)-25–04 OF 2021(P) AND 02(f)-26–04 OF 2021(P)

ABANG ISKANDAR PCA, HASNAH HASHIM AND RHODZARIAH BUJANG FCJJ

27 DECEMBER 2024

Evidence — Course of trial — Recantation of witness's evidence — Whether there was a recognised or established procedure for recantation of evidence — Whether governing principle to determine evidence of witness who changed testimony in Khoon Chye Hin v PP [1961] 1 MLJ 105b would also apply to witness who recanted his/her evidence

Evidence — Expert evidence — Weight of — Conflicting expert evidence — Conflicting evidence between government expert in hand writing and expert witness from private sector — High Court judge preferred evidence of expert witness from private sector — Court of Appeal preferred government expert — Whether Court of Appeal was correct in law in preferring and giving more weight to government expert merely because expert witness from private sector was paid for his services

Evidence — Onus of proof — Forgery — Whether onus of proof lies with party asserting forgery of signature in document or with counter party relying on existence of such document to prove its validity and genuineness

Evidence — Witness — Interested witness — Whether a defendant, a party to the suit, and an attesting solicitor were interested witnesses, and if so, how much weight ought to be attached to evidence of such witnesses — Evidence Act 1950 ss 118 & 120(1)

The suits in the High Court revolved around a dispute between two siblings on the shareholding in family companies. Theow Say Kow @ Teoh Kiang Seng ('Henry') was the eldest brother and Teoh Kiang Hong ('Gary') was the youngest brother. Henry, his parents and three of their companies as the plaintiffs had filed a suit ('Case E') against Gary, his wife, their two companies, their solicitors, some other companies and OCBC Bank as the defendants. In Case E, the plaintiffs sought for declarations and injunctions in respect of four lands belonging to the family companies ('the lands') on the basis of fraudulent

transfer, conspiracy, and constructive trust. Case E was heard together with Gary's claim in Case B and Henry's claim in Case C. In Case B, Gary claimed for specific performance of a share sale agreement ('SSA') allegedly entered into orally and informally in 2001/2002 by way of a split agreement which was formalised in 2005, for the sale of Henry's share in the family companies to Gary. Case C was Henry's claim against the solicitors (Khor Gaik Thiam ('Khor'), Latsmanan Ponnusamy and their legal firm) premised on conspiracy and fraud in respect of the sale and purchase agreement ('SPA') of the lands; and in respect of the preparation of the SSA. The High Court dismissed Henry's claim, and allowed Gary's claim for specific performance of the SSA. In gist, the High Court opined that the recantation of Henry's mother's evidence had effectively destroyed Henry's case against the defendants. In this regard, the High Court had rejected the evidence of Henry's mother prior the recantation and only accepted her evidence post the recantation. In relation to the SSA, the High Court opined that the expert's evidence ought to be tested against the totality of other evidence, in particular that of the counsel Khor, who was a disinterested witness, having actually witnessed the signing of the SSA by Henry. However, on appeal, the Court of Appeal disagreed with the decisions of the High Court and set aside the same. In relation to the recantation of evidence, the questions of law that arose before the Federal Court were: (a) whether there was in the law of evidence a recognised or established procedure for the recantation of evidence, as held by the Court of Appeal, and that in the absence of an adherence to that procedure, a recantation of his/her evidence by a witness could not be recognised by the court ('QOL 1') — in this regard, the Court of Appeal opined that recantation involved two-staged application where leave of the court was sought to recall the witness and sufficient and satisfactory reasons must be shown for the recall of the witness; (b) whether the principles stated by Thomson CJ in *Khoon Chye Hin v Public Prosecutor* [1961] 1 MLJ 105b ('*Khoon Chye Hin*') and applied widely as a governing principle in both Malaysia and Singapore to determine the evidence of a witness who had changed his/her testimony, would also apply to a witness who had recanted his/her evidence ('QOL 2'); and (c) whether the Court of Appeal had acted correctly in law in selecting, without more, the first part of the evidence of the witness (which was recanted) as admissible for considering the merits of the case and rejecting the latter part of her evidence as unacceptable ('QOL 3'). With regard to the SSA, the questions of law to be determined by the Federal Court were: (i) whether the Court of Appeal misdirected itself with regard to the principles set out in *Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd* [2017] 4 MLJ 697 ('*Letchumanan*') in relation to whether the onus of proof lies with the party asserting forgery or whether the onus of proof lies with the counter party relying on the existence of the said instrument or document to prove its validity and genuineness ('QOL 4'); (ii) whether the Court of Appeal was correct in law in holding that a witness would be deemed to be an interested witness merely because he was sued as a

defendant ('QOL 5'); (iii) whether the Court of Appeal was correct in law in holding that a witness would be deemed an interested witness merely because he/she was a party to the suit ('QOL 6'); and (iv) in the absence of any finding of fraud, conspiracy or impropriety on the part of an attesting solicitor, whether the court was correct in law to consider the attesting solicitor an interested witness solely for the reason that the attesting solicitor was made a party to the suit and thereby rejecting his/her evidence in totality ('QOL 7'). Pertaining to the weight of evidence of handwriting experts called by both parties to testify on the signature of Henry on the SSA, the questions of law that arose were: (A) whether the Court of Appeal was correct in law to have preferred the evidence of a government expert ('PW5') as opposed to that of an expert witness from the private sector ('DW2'), merely because the expert witness was paid for his services by one of the parties and the government expert was not ('QOL 8'); and (B) whether as a matter of law and policy, it was justiciable for the court to accord less weight to the evidence of expert witnesses from the private sector (whose independence and expertise were not challenged) solely on the ground that they were paid by a party and instead accorded more weight to the evidence of expert witnesses from the government department on the ground that they were not so paid ('QOL 9) — in relation to these issues, it ought to be noted that contrary to the decision of the Court of Appeal, the High Court had preferred the evidence DW2 over PW5.

Held, allowing all the appeals, setting aside the decisions of the Court of Appeal and affirming all the decisions of the High Court with costs:

(1) In the present appeals, the alleged recantation occurred, not at the appellate stage, but during the trial itself, when the mother had completed her cross examination and after she had foregone her right of re-examination, which, on the facts were arguably distinguishable from the foreign cases cited by the Court of Appeal. The recantation or retraction of evidence occurring during the trial was a matter for assessment of evidence of the alleged unreliable or untruthful witness. As both parties before the court had acknowledged that there was no established rule of evidence or procedure relating to recantation in our domestic law thus far, the Court of Appeal's decision on the two-stage application procedure; and the effect of a recantation would be the total rejection of the evidence of the recanted witness, were incorrect. On the contrary, great care and scrutiny ought to be exercised in assessing the credibility and the cogency of the evidence following a recantation. Based on these findings, the court answered QOL 1 in the negative (see paras 55 & 57–59).

(2) Although recantation or retraction of evidence may not be entirely the same as mere inconsistencies or discrepancies or contradictories in one's evidence, they all shared one commonality, namely, changes made to prior evidence. Based on that shared criterion, the court was of the view

that adopting *Khoon Chye Hin* in assessing the credibility of evidence given on recantation during trial was not entirely incorrect. Thus, although *Khoon Chye Hin* did not deal with recantation per se, the court agreed that the principle distilled from that case had laid down the correct approach to be followed. It was this. It would ultimately boil down to a matter of proper appreciation and assessment of the evidence under scrutiny by the court when dealing with a witness who had recanted, whose credibility was being impugned. In that regard, the court answered QOL 2 in the affirmative (see paras 72–75).

(3) The court found that it was unnecessary for the court to answer QOL 3 because the exercise of compartmentalising the evidence was done by both the courts below, albeit on different reasons. The trial judge accepted the post recantation 'after having scrutinised with great care her testimony and after comparing it with the undisputed contemporaneous documents' while the Court of Appeal accepted the prior recantation evidence as it was unsafe to act on untested uncross-examined evidence (see para 76).

(4) The Federal Court case of *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1 had settled the law on the standard of proof required to prove fraud in a civil claim, and that standard was one, on the balance of probabilities, and not one, beyond reasonable doubt. On this aspect, the court agreed that the Court of Appeal had rightly corrected the wrong standard that was applied by the High Court. However, the Court of Appeal erred in placing the onus of proving forgery on Gary, instead of on Henry. In this regard, the learned justices of the Court of Appeal did not properly address or direct their mind on the question of burden of proof in *Letchumanan*, particularly, in para 57 and if the Court of Appeal had done so, they would have arrived at the conclusion that when one 'relies on some new matter which, if true, is an answer to it, the burden of proof changes sides …' and as such, this new matter, namely forgery which was raised by Henry in his statement of defence, if successful, would be a complete answer to Gary's case. And that required that Henry would have to discharge the burden of proving forgery which burden to be discharged had shifted to him. There was a Latin maxim that reads, *onus probandi incumbit ei qui dicit, non ei qui negat*, that translated to mean, the burden of proof lies with the one who speaks, not the one who denies the same. The court therefore answered QOL 4 in the affirmative (see paras 88–89 & 101–103).

(5) Generally, at law, all persons shall be competent to testify unless they came under any of the exceptions in s 118 of the Evidence Act 1950 ('the EA'). In all civil proceedings the parties to the suit shall be competent witnesses (s 120(1) of the EA). Thus, a plaintiff or a defendant was not, in as much as he/she was interested in the outcome of the case, to be

regarded as an interested witness, merely on the label he/she was wearing as a party to the suit. There ought to be proof obtained through the examination of witnesses that a witness was an interested witness. In the process of examination of witnesses where the court observed and so found a witness as interested or otherwise, the court was duty-bound to assess, examine and weigh such evidence in the like manner as that of any other witnesses. It was only at the end of such an exercise that the court may finally decide to reject or admit his evidence, either wholly or in part, with justifications. A rejection of evidence of witnesses on ground of being interested witness alone was not justifiable, if evidence on record was otherwise trustworthy or consistent and corroborated (see paras 113–114, 117 & 123).

(6) The Court of Appeal had erred when it held that Khor, the attesting solicitor who was also made a party to the suit, who testified on his past experiences and dealings with the two brothers on the preparation of the SSA; who was never found to have conspired or had committed fraud or impropriety; and who had nothing to gain in the matter, was an interested witness and consequently rejected Khor's evidence in toto. His evidence in respect of the existence of the SSA and of witnessing the signing of the same was relevant, to be assessed, not solely on its own, but with the totality of other independent evidence, both in the form of oral as well as documentary evidence. In this regard, the court was satisfied that the trial judge had meticulously and properly examined the evidence before him in the correct context. The court deferred to his findings with regards to his treatment of Khor's evidence. The court found the rejection of Khor's evidence in the manner in which the Court of Appeal had done in these appeals was erroneous and as such, could not be sustained. The court therefore answered QOL 5, QOL 6 and QOL 7 in the negative (see paras 124–125).

(7) When there existed opposing opinions between experts, the court had the discretion to prefer one expert's opinion to the other. The trial judge's preference of one expert's opinion to the other, was an aspect which the appellate court ought to have given considerable weight or deference, unless a clear error was manifested. In the present case, one of the major reasons for accepting DW2 over PW5 by the trial judge had been the production of hard evidence, ie, the specimens used for comparison against the impugned signature. DW2 produced the samples while PW5 did not. Moreover, the documents from where the specimens were obtained and used for analysis by DW2 were not disputed by Henry. In the court's view, the satisfaction or otherwise of the trial judge in this respect ought to have been given due deference by the Court of Appeal as those reasons advanced by him were substantiated by evidence and his conclusion was therefore not plainly wrong (see paras 142 & 146).

(8) Further, although the court had the discretion to choose one expert's opinion over the other, preferring the evidence of a government expert as opposed to that of an expert witness from the private sector, merely because the expert witness from the private sector was paid for his services by one of the parties, whereas the government expert was not, would not provide a valid or reasonable ground to premise a conclusion. Based on the above findings, the court answered QOL 8 and QOL 9 in the negative (see paras 148–149).

[Bahasa Malaysia summary

Saman-saman di Mahkamah Tinggi berkisar tentang pertikaian antara dua beradik mengenai pegangan saham dalam syarikat-syarikat keluarga. Theow Say Kow @ Teoh Kiang Seng ('Henry') merupakan abang sulung manakala Teoh Kiang Hong ('Gary') ialah adik bongsu. Henry, ibu bapanya dan tiga syarikat mereka sebagai plaintif telah memfailkan saman ('Kes E') terhadap Gary, isterinya, dua syarikat mereka, peguam cara mereka, beberapa syarikat lain dan OCBC Bank sebagai defendan. Dalam Kes E, plaintif-plaintif memohon pengisytiharan dan injunksi berkenaan dengan empat tanah milik syarikat keluarga ('tanah tersebut') atas dakwaan berlakunya pemindahan secara fraud, konspirasi dan kewujudan amanah konstruktif. Kes E telah didengar bersama-sama dengan tuntutan Gary dalam Kes B dan tuntutan Henry dalam Kes C. Dalam Kes B, Gary menuntut pelaksanaan spesifik perjanjian penjualan saham ('SSA') yang didakwa dibuat secara lisan dan tidak rasmi pada 2001/2002 melalui perjanjian berasingan yang kemudiannya menjadi rasmi pada tahun 2005, untuk penjualan saham Henry dalam syarikat-syarikat keluarga tersebut kepada Gary. Kes C ialah tuntutan Henry terhadap peguamcara (Khor Gaik Thiam ('Khor'), Latsmanan Ponnusamy dan firma guaman mereka) berdasarkan konspirasi dan fraud berkenaan dengan perjanjian jual beli ('SPA') tanah tersebut; dan berkenaan dengan penyediaan SSA tersebut. Mahkamah Tinggi menolak tuntutan Henry, dan membenarkan tuntutan Gary untuk pelaksanaan spesifik SSA tersebut. Pada dasarnya, Mahkamah Tinggi berpendapat bahawa penarikan semula keterangan ibu Henry pada kesannya telah memusnahkan kes Henry terhadap defendan-defendan. Dalam hal ini, Mahkamah Tinggi telah menolak keterangan ibu Henry yang dibuat sebelum penarikan semula tersebut dan hanya menerima keterangannya selepas penarikan semula tersebut. Berhubung dengan SSA tersebut, Mahkamah Tinggi berpendapat bahawa keterangan pakar harus diuji terhadap keseluruhan keterangan lain, khususnya keterangan peguam Khor, yang merupakan saksi yang tidak berkepentingan, yang telah benar-benar menyaksikan penandatanganan SSA tersebut oleh Henry. Bagaimanapun, semasa rayuan, Mahkamah Rayuan tidak bersetuju dengan keputusan Mahkamah Tinggi dan mengenepikan keputusan tersebut. Berhubung dengan penarikan semula keterangan, persoalan undang-undang yang timbul di Mahkamah Persekutuan ialah: (a) sama ada terdapat prosedur yang diiktiraf atau ditetapkan untuk penarikan semula keterangan dalam

undang-undang keterangan, seperti yang diputuskan oleh Mahkamah Rayuan, dan bahawa sekiranya tiada pematuhan kepada prosedur tersebut, penarikan semula keterangan oleh saksi tidak dapat diiktiraf oleh mahkamah ('PUU 1') – dalam hal ini, Mahkamah Rayuan berpendapat bahawa penarikan semula keterangan melibatkan permohonan dua peringkat di mana kebenaran mahkamah dipohon untuk memanggil semula saksi dan alasan yang mencukupi dan memuaskan hendaklah ditunjukkan untuk memanggil semula saksi; (b) sama ada prinsip yang dinyatakan oleh Thomson CJ dalam *Khoon Chye Hin v Public Prosecutor* [1961] 1 MLJ 105b ('*Khoon Chye Hin*') dan digunakan secara meluas sebagai prinsip yang terpakai di Malaysia dan Singapura untuk menentukan keterangan saksi yang telah menukar keterangannya, juga akan terpakai kepada saksi yang telah menarik semula keterangannya ('PUU 2'); dan (c) sama ada Mahkamah Rayuan telah bertindak dengan betul dalam undang-undang apabila hanya memilih bahagian pertama keterangan saksi (yang telah ditarik balik) sebagai boleh diterima untuk menimbangkan merit kes tersebut dan menolak bahagian yang selebihnya sebagai tidak boleh diterima ('PUU 3'). Berkenaan dengan SSA tersebut, persoalan undang-undang yang perlu diputuskan oleh Mahkamah Persekutuan ialah: (i) sama ada Mahkamah Rayuan terkhilaf mengarahkan dirinya berkenaan dengan prinsip yang dinyatakan dalam *Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd* [2017] 4 MLJ 697 ('*Letchumanan*') berhubung dengan sama ada tanggungjawab pembuktian terletak pada pihak yang menegaskan tentang pemalsuan atau sama ada tanggungjawab pembuktian terletak pada pihak lawan yang bergantung kepada kewujudan instrumen atau dokumen tersebut untuk membuktikan keabsahan dan ketulenannya ('PUU 4'); (ii) sama ada Mahkamah Rayuan betul dari segi undang-undang dalam memutuskan bahawa saksi akan disifatkan sebagai saksi yang berkepentingan semata-mata kerana dia telah disaman sebagai defendan ('PUU 5'); (iii) sama ada Mahkamah Rayuan adalah betul dari segi undang-undang dalam memutuskan bahawa seorang saksi akan disifatkan sebagai saksi yang berkepentingan semata-mata kerana dia adalah pihak dalam saman tersebut ('PUU 6'); dan (iv) jika tiada apa-apa dapatan fraud, konspirasi atau ketidakwajaran di pihak peguam cara yang memberi keterangan, sama ada mahkamah adalah betul di sisi undang-undang untuk menganggap peguam yang memberikan keterangan sebagai saksi adalah saksi yang berkepentingan semata-mata atas sebab peguam cara yang memberi keterangan tersebut telah dijadikan pihak dalam saman tersebut dan dengan itu menolak keterangannya secara keseluruhan ('PUU 7). Berkenaan dengan nilai keterangan pakar tulisan tangan yang dipanggil oleh kedua-dua pihak untuk memberi keterangan mengenai tandatangan Henry pada SSA tersebut, persoalan undang-undang yang timbul ialah: (A) sama ada Mahkamah Rayuan betul dari segi undang-undang untuk memilih keterangan seorang pakar dari kerajaan ('PW5') berbanding saksi pakar dari sektor swasta ('DW2'), semata-mata kerana saksi pakar swasta tersebut dibayar

perkhidmatannya oleh salah satu pihak dan pakar kerajaan tersebut tidak dibayar ('PUU 8'); dan (B) sama ada dari segi undang-undang dan dasar, adalah wajar bagi mahkamah untuk memberikan nilai berat yang kurang kepada keterangan saksi pakar dari sektor swasta (yang kebebasan dan kepakarannya tidak dicabar) semata-mata atas alasan bahawa mereka telah dibayar oleh suatu pihak dan sebaliknya memberikan lebih nilai berat kepada keterangan saksi pakar dari jabatan kerajaan atas alasan bahawa mereka tidak dibayar ('PUU 9') — berhubung dengan isu-isu ini, perlu diingatkan bahawa bertentangan dengan keputusan Mahkamah Rayuan, Mahkamah Tinggi memilih keterangan DW2 berbanding PW5.

Diputuskan, membenarkan keseluruhan rayuan, mengenepikan keputusan Mahkamah Rayuan, dan mengesahkan keseluruhan keputusan Mahkamah Tinggi dengan kos:

(1) Dalam rayuan-rayuan semasa, penarikan semula keterangan tersebut berlaku, bukan pada peringkat rayuan, tetapi semasa perbicaraan itu sendiri, apabila ibu Henry telah menyelesaikan pemeriksaan balasnya dan selepas dia telah melepaskan haknya untuk pemeriksaan semula, yang berdasarkan fakta adalah boleh dikatakan boleh dibezakan daripada kes-kes asing yang dipetik oleh Mahkamah Rayuan. Penarikan semula keterangan yang berlaku semasa perbicaraan adalah perkara untuk penilaian keterangan saksi yang didakwa tidak boleh dipercayai atau tidak benar. Memandangkan kedua-dua pihak di hadapan mahkamah telah mengakui bahawa tidak ada peraturan keterangan atau prosedur yang ditetapkan berkaitan dengan penarikan semula keterangan dalam undang-undang domestik kita setakat ini, keputusan Mahkamah Rayuan mengenai prosedur permohonan dua peringkat; dan kesan penarikan semula adalah penolakan sepenuhnya keterangan saksi yang ditarik balik, adalah tidak betul. Sebaliknya, penilaian kredibiliti dan kesesuaian keterangan berikutan penarikan semula tersebut harus dijalankan dengan sangat berhati-hati dan teliti. Berdasarkan dapatan-dapatan ini, mahkamah menjawab PUU 1 secara negatif (lihat perenggan 55 & 57–59).

(2) Walaupun penarikan semula atau penarikan balik keterangan mungkin tidak sama sepenuhnya dengan tidak konsistenan atau percanggahan atau perselisihan dalam keterangan seseorang, semuanya itu berkongsi satu persamaan, iaitu, perubahan yang dibuat kepada keterangan terdahulu. Berdasarkan kriteria yang dikongsi bersama tersebut, mahkamah berpendapat bahawa menerima pakai *Khoon Chye Hin* dalam menilai kredibiliti keterangan yang diberikan mengenai penarikan semula semasa perbicaraan adalah tidak sepenuhnya salah. Oleh itu, walaupun *Khoon Chye Hin* tidak berkaitan dengan penarikan semula keterangan, mahkamah bersetuju bahawa prinsip yang disaring daripada kes tersebut telah menetapkan pendekatan yang betul untuk diikuti.

Prinsip yang dimaksudkan adalah bahawa pada akhirnya semuanya tertumpu kepada soal penghayatan dan penilaian yang sewajarnya terhadap keterangan yang diteliti oleh mahkamah apabila berurusan dengan saksi yang telah menarik semula keterangan, yang kredibilitinya dipertikaikan. Sehubungan itu, mahkamah menjawab PUU 2 secara afirmatif (lihat perenggan 72–75).

(3) Mahkamah mendapati bahawa mahkamah tidak perlu menjawab PUU 3 kerana pelaksanaan pembahagian keterangan telah dilakukan oleh kedua-dua mahkamah di bawah, walaupun atas sebab yang berbeza. Hakim bicara menerima keterangan selepas daripada penarikan semula tersebut 'setelah meneliti dengan teliti keterangannya dan selepas membandingkannya dengan dokumen sezaman yang tidak dipertikaikan' manakala Mahkamah Rayuan menerima keterangan sebelum penarikan semula tersebut kerana tidak selamat untuk bertindak atas keterangan yang tidak diperiksa balas yang belum diuji (lihat perenggan 76).

(4) Kes Mahkamah Persekutuan *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1 telah menyelesaikan undang-undang mengenai standard pembuktian yang diperlukan untuk membuktikan fraud dalam tuntutan sivil, dan standard tersebut adalah di atas imbangan kebarangkalian, dan bukan melampaui keraguan munasabah. Mengenai aspek ini, mahkamah bersetuju bahawa Mahkamah Rayuan adalah betul apabila memperbetulkan standard yang salah yang digunakan oleh Mahkamah Tinggi. Bagaimanapun, Mahkamah Rayuan terkhilaf meletakkan tanggungjawab pembuktian pemalsuan kepada Gary, bukannya kepada Henry. Dalam hal ini, hakim-hakim Mahkamah Rayuan yang bijaksana tidak menangani atau mengarahkan fikiran mereka dengan betul mengenai persoalan beban pembuktian dalam *Letchumanan*, khususnya, dalam perenggan 57 dan jika Mahkamah Rayuan berbuat demikian, tentunya mereka akan membuat kesimpulan bahawa apabila seseorang 'relies on some new matter which, if true, is an answer to it, the burden of proof changes sides ...' dan oleh itu, perkara baru ini, iaitu pemalsuan yang dibangkitkan oleh Henry dalam pernyataan pembelaannya, jika berjaya, akan menjadi jawapan lengkap kepada kes Gary. Dan itu memerlukan Henry untuk melepaskan beban pembuktian pemalsuan yang mana beban yang perlu dilepaskan telah beralih kepadanya. Terdapat pepatah Latin yang berbunyi, *onus probandi incubit ei qui dicit, non ei qui negat*, yang bermaksud, beban pembuktian terletak pada orang yang menyatakan, bukan orang yang menafikan perkara yang sama. Oleh itu mahkamah menjawab PUU 4 secara afirmatif (lihat perenggan 88–89 & 101–103).

(5) Secara amnya, di sisi undang-undang, semua orang adalah kompeten untuk memberi keterangan melainkan mereka termasuk di bawah

mana-mana pengecualian dalam s 118 Akta Keterangan 1950 ('AK'). Dalam semua prosiding sivil, pihak-pihak kepada guaman itu hendaklah menjadi saksi yang kompeten (s 120(1) AK). Oleh itu, walaupun mana-mana plaintif atau defendan mempunyai kepentingan kepada keputusan sesuatu kes, mereka tidak boleh dianggap sebagai saksi yang berkepentingan, hanya berdasarkan label yang mereka pakai sebagai pihak dalam saman tersebut. Perlu ada bukti yang diperoleh melalui pemeriksaan saksi yang membuktikan bahawa saksi tersebut adalah saksi yang berkepentingan. Dalam proses pemeriksaan saksi di mana mahkamah memerhati dan mendapati saksi tersebut berkepentingan atau sebaliknya, mahkamah mempunyai kewajipan untuk menilai, memeriksa dan menimbang keterangan tersebut dengan cara yang sama seperti mana-mana saksi lain. Hanya pada penghujung proses sedemikian mahkamah akhirnya boleh memutuskan untuk menolak atau menerima keterangannya, sama ada sepenuhnya atau sebahagian, dengan justifikasi. Penolakan keterangan saksi atas alasan bahawa saksi tersebut adalah saksi berkepentingan sahaja adalah tidak wajar, jika keterangan dalam rekod sebaliknya boleh dipercayai atau konsisten dan disokong (lihat perenggan 113–114, 117 & 123).

(6) Mahkamah Rayuan telah terkhilaf apabila memutuskan bahawa Khor, peguam cara yang memberi keterangan yang turut dijadikan pihak dalam saman, yang memberi keterangan mengenai pengalaman dan urusannya yang terdahulu dengan dua beradik tersebut mengenai penyediaan SSA tersebut; yang tidak pernah didapati bersubahat atau melakukan fraud atau ketidakwajaran; dan yang tidak mempunyai apa-apa keuntungan dalam perkara tersebut, adalah saksi yang berkepentingan dan akibatnya menolak keterangan Khor secara keseluruhan. Keterangan beliau berkenaan dengan kewujudan SSA tersebut dan berkenaan dengan penyaksian penandatanganan SSA tersebut adalah relevan, untuk dinilai, bukan secara bersendirian, tetapi bersama-sama dengan keseluruhan keterangan bebas lain, baik dalam bentuk keterangan lisan mahupun keterangan dokumentar. Berhubung dengan ini, mahkamah berpuas hati bahawa hakim bicara telah meneliti keterangan di hadapannya dengan teliti dan betul dalam konteks yang betul. Mahkamah menghormati dapatannya berkenaan dengan penilaiannya terhadap keterangan Khor. Mahkamah mendapati penolakan keterangan Khor mengikut cara yang dilakukan oleh Mahkamah Rayuan dalam rayuan-rayuan semasa adalah salah dan oleh itu, tidak dapat dikekalkan. Oleh itu mahkamah menjawab PUU 5, PUU 6 dan PUU 7 secara negatif (lihat perenggan 124–125).

(7) Apabila terdapat pendapat yang bertentangan antara pakar-pakar, mahkamah mempunyai budi bicara untuk memilih pendapat seorang pakar berbanding pakar-pakar yang lain. Pemilihan oleh hakim bicara terhadap satu pendapat pakar berbanding pendapat pakar yang lain,

adalah satu aspek yang sepatutnya diberikan nilai atau penghormatan yang besar oleh mahkamah di peringkat rayuan, melainkan kesilapan yang jelas dizahirkan. Dalam kes ini, salah satu sebab utama mengapa DW2 diterima oleh hakim bicara berbanding PW5, adalah disebabkan oleh pengemukaan keterangan yang kukuh, iaitu, spesimen yang digunakan untuk perbandingan terhadap tandatangan yang disangkal. DW2 mengemukakan sampel tersebut manakala PW5 tidak. Selain itu, dokumen dari mana specimen tersebut diperoleh dan digunakan untuk analisis oleh DW2 tidak dipertikaikan oleh Henry. Pada pandangan mahkamah, kepuasan atau sebaliknya hakim bicara berkenaan hal ini sepatutnya diberi penghormatan yang sewajarnya oleh Mahkamah Rayuan kerana alasan-alasan yang dikemukakan olehnya telah dibuktikan dengan keterangan dan oleh itu kesimpulannya tidak secara jelas salah (lihat perenggan 142 & 146).

(8) Selain itu, walaupun mahkamah mempunyai budi bicara untuk memilih satu pendapat pakar berbanding pendapat pakar yang lain, pemilihan keterangan pakar kerajaan berbanding keterangan saksi pakar dari sektor swasta, semata-mata kerana saksi pakar dari sektor swasta dibayar untuk perkhidmatannya oleh salah satu pihak, sedangkan pakar kerajaan tidak, tidak akan memberikan alasan yang sah atau munasabah untuk membuat kesimpulan. Berdasarkan dapatan-dapatan di atas, mahkamah menjawab PUU 8 dan PUU 9 secara negatif (lihat perenggan 148–149).]

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Evidence Act 1950 ss 45, 101, 102, 103, 118, 120(1)
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Appeal from: *Theow Say Kow @ Teoh Kiang Seng, Henry v Graceful Frontier Sdn Bhd & Ors and other appeals* [2020] MLJU 57 (Court of Appeal, Putrajaya)

Cyrus Das (with Ranjit Singh, Raj Shankar, Gregory Ling, Sishitra a/p Sridaran and Hannah Choong) (Gregory Ling) in Civil Appeal Nos 02(f)-23–04 of 2021(P) and 02(f)-25–04 of 2021(P) for the appellants.

Ambiga Sreenevasan (with P Navaratnam, S Parameswaran and Sarah Ho Yixin) (Nava & Assoc) in Civil Appeal Nos 02(f)-24–04 of 2021(P) and 02(f)-26–04 of 2021(P) for the appellants.

T Gunaseelan (with Balwant Singh Purba, Ravin Vello, How Li Nee, Lee Min Yau, Marcus Lee Min Lun and Ong Ken-Jeen) (Vello & Assoc) for the respondent.

Abang Iskandar PCA:

INTRODUCTION

[1] There are four appeals that were heard together involving a total of 12 questions of law ('QOLs') as granted at the leave stage. They are eight QOLs in cases No 23 and 25 and four QOLs in cases No 24 and 26. There are, however, overlapping in some of the QOLs which will be dealt with together based on the issues as will be enumerated below.

[2] We heard oral submissions by all learned counsel representing the respective parties, and at the end of those submissions, we were not able to come up with a decision on that day, and we therefore indicated to all learned counsel that we needed a bit of time to consider the respective submissions and that they would be informed once a decision is reached pertaining to each of these appeals, in due course. We have now reached our decisions and what follow below are our deliberations of the issues raised and our reasons as to why we have so decided.

[3] My learned sisters Justice Hasnah bt Dato' Mohammed Hashim and Justice Rhodzariah bt Bujang have read this judgment in draft and they had indicated to me that they agreed with the same and that it becomes the judgment of this court.

BACKGROUND FACTS AND THE ANTECEDENT PROCEEDINGS

[4] These appeals emanate from three suits at the High Court which essentially involve a dispute between two siblings on shareholding in family companies. Theow Say Kow @ Teoh Kiang Seng ('Henry') is the eldest brother and Teoh Kiang Hong ('Gary') is the youngest brother.

[5] Chronologically, on 1 February 2008 (Case No 22–58–2008), Henry filed a claim against Gary, his wife, their parents and others, on the basis of fraudulent transfer of the four landed properties held by the family companies wherein Henry was one of the shareholders who claimed to have invested about RM6.1m for the purchase of the said lands in 1994/1995. It was on the basis of his alleged contribution that Henry claimed that Gary/wife/parents to have held those properties on constructive trust ('Case A').

[6] Following this Case A, on 25 February 2008, Gary sent a demand letter to Henry for the performance of the share sale agreement ('SSA') allegedly entered into orally and informally in 2001/2002 by way of a split agreement which was formalised in 2005, for the sale of Henry's share in the family companies to Gary. Henry denied the existence of any such an agreement and subsequently filed a police report on 8 March 2008, claiming that was the first time he saw the unstamped SSA. Henry further claimed to have never instructed the solicitor, Khor Gaik Thiam ('Khor') to prepare the said SSA, and that he never signed the same. Henry alleged forgery of his signature and questioned the validity of the SSA. This led to the filing of the High Court suit by Gary against Henry in Case No 22–121–2008 ('Case B').

[7] Henry then filed another suit against the solicitors — Khor, Latsmanan Ponnusamy and their legal firm — on the grounds of conspiracy and fraud in respect of the sale and purchase agreement ('SPA') of the four lands of the family companies; and in respect of the preparation of the SSA. This is the High Court suit no 22–610–2008 ('Case C').

[8] Following a shareholders meeting on 19 October 2009, the SPAs for the sale of those lands to Gary's two companies were cancelled, whereupon the parents filed Suit No 22–616–2009 ('Case D') against Gary and wife and their two companies. The parents have also publicly disowned Gary, wife and their children.

[9] Subsequently, both Case A and Case D were withdrawn, and later, Henry, father, mother, and three family companies filed the present suit 22–52–2010 ('Case E') as plaintiffs against Gary and wife, their two companies, the solicitors, some other companies and OCBC Bank on the other as defendants; and Public Bank joined as intervener. The claims were, *inter alia*, for declarations and injunctions in respect of the four lands on the basis of fraudulent transfer; conspiracy; and constructive trust.

[10] This Case E was heard together with Gary's specific performance of SSA's claim against Henry in Case B, and Henry's separate claim against the solicitors in Case C.

[11] The High Court dismissed Henry's claim, and allowed Gary's claim for specific performance of the SSA. On appeal, the Court of Appeal reversed and set aside the decisions of the High Court. This is found in *Theow Say Kow @ Teoh Kiang Seng, Henry v Graceful Frontier Sdn Bhd & Ors and other appeals* [2020] MLJU 57; [2020] 1 LNS 52 ; [2020] AMEJ 0035.

AT THE FEDERAL COURT

[12] Before going to each and every QOL posed to us, we find it is pertinent to highlight that both parties have submitted, without hesitation and in unison that our answers to the questions posed relating to the existence and validity of the SSA shall determine all these appeals. With respect, we agree. This is because, whatever findings we may make in respect of Henry's constructive trust claim in the family companies' shares, that claim will necessarily fall if it is proven that he has indeed sold or disposed of all his shares to Gary.

[13] Throughout the hearing of these appeals, we were presented in considerable detail the evidence that were adduced before the High Court. We appreciate, as the facts of these appeals have shown, that the complexity of the matter lies on the apparently stark differences taken by the courts below in respect of their assessment of the evidence, and their approach to the change of stance by the mother that had ultimately affected the final outcome of the cases as appearing in the decisions of the High Court being reversed by the Court of Appeal.

[14] It was impressed upon us, by Henry's learned counsel, that at this stage of the appeal, we must confine ourselves to the QOLs in respect of where leave was granted pursuant to s 96 of the Courts of Judicature Act 1964, on the basis of the facts as found by the Court of Appeal (*Tengku Dato' Kamal Ibni Sir Sultan Abu Bakar & Ors v Bursa Malaysia Securities Bhd* [2022] 3 MLJ 294; [2022] 4 CLJ 854; *Tenaga Nasional Malaysia v Batu Kemas Industri Sdn Bhd and another appeal* [2018] 5 MLJ 561; [2018] 6 CLJ 683 ('*Batu Kemas*'); *Spind Malaysia*

Sdn Bhd v Justrade Marketing Sdn Bhd & Anor [2018] 4 MLJ 34; [2018] 4 CLJ 705 ('*Spind Malaysia*'); *Ho Tack Sien & Ors v Rotta Research Laboratorium SpA & Anor (Registrar of Trade Marks, intervener)* [2015] 4 MLJ 166; [2015] 4 CLJ 20 ('*Ho Tack Sien*').

[15] Quite importantly in this regard, as submitted by Henry's learned counsel, that we, at this level of appeal, are not in any way reviewing the findings of facts in their entirety. It was pointed out to us that the Court of Appeal was the final court of facts, such that in so far as the determination of questions of facts is concerned, it stopped there. The judgment of the Indian Supreme Court in *Santosh Hazari v Purushottam Tiwari* [2001] 3 SCC 179 ('*Santosh Hazari*') was cited to show that:

> The first appellate court continues, as before, to be a final court of facts; pure findings of fact remain immune from challenge before the High Court in the second appeal.

[16] Gary's learned counsel on the other hand, proffered a contrarian view. He argued that this court is not precluded from reviewing the findings of fact as found by the Court of Appeal if it is found that the Court of Appeal had incorrectly applied the 'plainly wrong test' in its reversal of the decisions of the High Court (*Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67 ('*Wendy Tan*'); *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; *Tengku Dato' Ibrahim Petra bin Tengku Indra Petra v Petra Perdana Bhd and another appeal* [2018] 2 MLJ 177). This is particularly so in a situation where there are conflicting findings of facts as opposed to concurrent findings of facts as in *Batu Kemas*, *Spind Malaysia* and *Ho Tack Sien,* as cited by Henry's counsel.

[17] Crucially, we were urged to be careful in accepting the proposition that the Court of Appeal is the final court of facts based on *Santosh Hazari* considering the different system of appeal here and in India, and in particular, where there is a specific provision in s 100 of the Code of Civil Procedure 1908 relating to the second appeal that goes to the same High Court purely on a substantial question of law, and not on facts. That, having been highlighted to us, we were not persuaded to agree with such contention that the Court of Appeal is the final court of facts.

[18] That said, we are mindful of the trite position of non-intervention taken by this court in relation to where there are concurrent findings of the courts below. In *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2003] 3 MLJ 257, this court stated that 'there is no room for this court to reverse the concurrent finding of fact made by the High Court and the Court of Appeal that the appellants were the guilty party in breach of the agreements since it is trite that the appellate

court is not prepared to interfere with the concurrent finding of facts made by the courts below' (similar approach taken in *Batu Kemas, Spind Malaysia* and *Ho Tack Sien*). However, where there exist conflicting findings of facts by the High Court and the Court of Appeal, it is imperative for us to look, in order to see how and why the Court of Appeal had reversed or set aside the trial judge's findings of facts within the parameters permitted by the extent of the QOLs granted.

[19] It is in this respect that in determining these appeals, we remind ourselves of the nature of our judicial duty at the appellate stage, when dealing with the conflicting approaches of the High Court on the one side and the Court of Appeal on the other, in their assessment of the evidence. As we understand it, at the appellate level, we are restricted to reviewing written transcripts of testimony and voluminous amounts of evidence, where, while the 'appeals are telescopic in nature, focusing narrowly on particular issues as opposed to viewing the case as a whole' (per Lacobucci and Major JJ, in *Housen v Nikolaisen* [2002] 2 SCR 235).

THE PLAINLY WRONG TEST

[20] In *Wendy Tan*, a recent decision of this court dealing with the sole question of law relating to the application of the 'plainly wrong' test, this court has reaffirmed and retained, by a unanimous decision of five-member panel of judges, of the 'plainly wrong' test in an appellate intervention of the trial judge's findings of facts, which test is ruled to be not subjected to rigid and specific guidelines. The court viewed that in dealing with issues relating to the findings of facts based on evidence, '... The trial judge should be accorded a margin of appreciation when his treatment of the evidence is examined by the appellate courts'.

[21] Undefined with specific meaning, the 'plainly wrong' test has been a well-established and settled test of assessment of the trial judge's decision on fact-finding. 'The adverb 'plainly' does not refer to the degree of confidence felt by the appellate court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached'. Thus, 'an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified' (*Henderson v Foxworth Investments Ltd and another* [2014] 1 WLR 2600).

[22] Hence, findings of facts made or arrived at by a trial judge that cannot be justified or explained away reasonably, would qualify as being 'plainly

wrong' and are liable to be disturbed, reversed and substituted on appeal. These include where there is 'a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence' (*Watt or Thomas and Thomas* [1947] AC 484; *Edwards (Inspector of Taxes) v Bairstow and Another* [1955] 3 All ER 48).

[23] Lord Shaw of Dunfermline in *Clarke v Edinburgh and District Tramways Co* 1919 SC (HL) 35 had occasion to say as follows:

> ... In courts of justice in the ordinary case things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, thus psychologically put, is the duty of an appellate court? In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put to himself, as I now do in this case, the question, Am I — who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case — in a position, not having those privileges, to come to a clear conclusion that the Judge who had them was *plainly wrong*? If I cannot be satisfied in my own mind that the Judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment. (Emphasis added.)

[24] With that in mind, we will first show where and how the courts below had conflicted on the various issues. These differences had resulted in the different verdicts having been reached by the lower courts. That naturally had become the basis upon which the 12 QOLs were posed before us for our consideration.

CONFLICTING FINDINGS OF THE COURTS BELOW

Recantation of mother's evidence

[25] This is one of the major issues that had shaped or affected the decisions of the courts below, as the mother, who was the fourth plaintiff, suing together with Henry, and was the first plaintiffs' witness, had elected to forego her re-examination, changed her stance and later withdrew herself as a plaintiff. Her conduct had raised a conflict in the courts below as to the admissibility and weight to be attached to her evidence following her change of stance. That was primarily due to the issue of cross-examination of the mother post recantation. Henry complained that he was not allowed to cross- examine the mother, while Gary contended that it was Henry who had abandoned the right to so cross-examine.

[26] The notes of proceedings showed that on 26 November 2012, the day 30 of the trial which was fixed for re-examination of the mother, Henry's counsel who was also the then counsel for the mother tendered her medical certificate. He further informed the court that the mother elected to forego her re-examination. Henry, who then held the power of attorney confirmed that fact. The case then proceeded with the examination-in-chief of Henry as the second witness for the plaintiffs.

[27] Later, on 26 December 2012, which was between day 31 (27 November 2012) and day 32 (7 January 2013), the mother lodged a police report stating that she had lied when giving evidence on oath. She said that she was coached as to what to say by either Henry and her former three counsel, at each and every court session. The mother, who had filed a notice of intention to act in person had then appeared on day 32 of the trial (7 January 2013) with her newly appointed counsel to tender her police report which was marked as P41. Thereafter, Gary's counsel cross-examined her. At the end of that cross-examination, Henry's counsel sought an adjournment to deliberate further on the evidence.

[28] The following day 33 (8 January 2013), Henry's counsel, who was also the mother's former counsel sought leave to cross-examine her in order to impeach her as she had turned hostile. He informed the court that he could not re-examine the mother as she no longer his witness. This application was objected to by the adverse party on the ground of, inter alia, solicitor-client privilege, as he was mother's former solicitor, and because the mother, who was then still the plaintiff cannot be cross-examined by a co-plaintiff. Further, there was this issue of whether all the three former counsel can continue to act under the Legal Profession Act 1976 in view of the serious allegations made against them by the mother.

[29] As we perused the notes of proceedings, we noticed that the trial judge had indeed raised the question of impeachment and the election to be made by Henry's counsel, whether to cross-examine the mother, or to impeach. Both parties argued on the matter, and finally, the proceeding was adjourned, on the request of Henry's said counsel, for further research and submissions on the issue.

[30] When the trial resumed on 10 January 2013, we found, from the notes of proceedings that the parties' arguments centered, not on the issue of cross-examination of the mother, but on the propriety of the three counsel to continue acting in the circumstances of the case. Henry's counsel, while admitting that there were no 'authorities bearing on the points or facts' in relation to the issue, and the case law produced by the adverse party was not in pari materia, argued that the allegations remained just that, namely, mere

allegations, and nothing more, and that being the case, they had the right to continue representing Henry. On the other hand, counsel for the defendants highlighted, inter alia, several provisions of the Legal Profession (Practice and Etiquette) Rules 1978, which in effect provide that those counsel could no longer act in light of the serious allegations levelled against them. Having heard and considered the submissions of parties, the trial judge decided to disqualify the former lawyers from acting for Henry.

[31] When the court resumed for continued hearing on 27 February 2013, the notes of proceedings recorded that Henry had all the newly appointed counsel appearing for him. The cross-examination issue was not pursued then, and the trial proceeded with the continued cross-examination of Henry as the second witness for the plaintiff. On this day, the mother had also formally withdrawn herself and her claims as a plaintiff to the suit, with no liberty to file afresh.

[32] This whole incident involving the conduct of the mother was viewed by the High Court as a recantation of the mother's evidence. As a result of which the High Court rejected her evidence from day one to day 29 and accepted her evidence that was given from day 32 'after having scrutinised with great care her testimony and after comparing it with the undisputed contemporaneous documents'. The High Court held that the 'mother's recantation had effectively destroyed Henry's case against the first to fourth and tenth to 17th defendants'.

[33] The Court of Appeal on the other hand took the view that 'the issue is not only of the recantation itself, but there is also the issue of whether the mother or any witness can recant evidence, in whole or in part that is already given at trial; what are the procedure and principles to be followed; and the question of the rights of the various parties in dispute'.

[34] Specifically, the Court of Appeal, after making a reference to the *Cambridge Dictionary* on the definition of recantation, had added to that definition that 'Recantation is to be contrasted with clarification or explanation and such similar efforts, often made by witnesses in the course of their oral testimonies. These clarifications may be done by the witnesses themselves whether at evidence in-chief, re-examination or even through cross-examination'.

[35] Following that statement, the Court of Appeal held that 'recantation is a formal withdrawal of earlier testimony. It is an involved two-staged application where leave of the court is sought to recall the witness. Sufficient and satisfactory reasons must be shown for the recall of the witness, and where satisfied, the witness is recalled and the recantation takes place'. Thus, the relevant QOL as framed asks:

(a) QOL 1:
Whether there is in the law of evidence a recognised or established procedure for the recantation of evidence, as held by the Court of Appeal, and that in the absence of an adherence to that procedure, a recantation of his/her evidence by a witness cannot be recognised by the court?

[36] The Court of Appeal was of the view that based on the notes of proceedings recorded in the High Court, there was actually no recantation by the mother of her evidence, but rather a testimony, upon being recalled, that she had lied, had given false evidence and that was because she was told to do so by Henry and/or her counsel.

[37] The decision of the Supreme Court of Western Australia in *Antonio Niki Pileggi v R* [2001] WASCA 260 ('*Pileggi*') was, inter alia, cited by the Court of Appeal to show that great care must be taken in assessing the credibility and the cogency of fresh evidence given on recantation of sworn evidence at trial. Other authorities such as *Davies & Cody v The King* [1937] 57 CLR 170 ('*Davies & Cody*'); and *R v Gale* [1970] VR 669 ('*Gale*'); *R v Flower & Siggins* [1966] 1 QB 146 ('*Flower*'); and *R v K (an accused)* [1984] 1 NZLR 264 ('*The Queen*') were cited as supporting authorities that new evidence following recantation ought to be subjected to heightened scrutiny, such that 'strong, cogent and convincing reasons with proof of the same must be shown as to why the 'false' evidence was given in the first place; and why the need or the change of stance now'.

[38] The Court of Appeal took the view that even if the High Court was entitled to allow the recantation, the judge ought not to have found the mother as a credible witness and that he ought to have rejected all her evidence, prior and post recantation, as the mother, 'Inasmuch as she was prepared to lie earlier, she may very well be lying still' especially when she was not allowed to be cross-examined by the persons seriously affected by her allegations, namely Henry and her former counsel. The Court of Appeal rejected the proposition advanced on behalf of Gary that the principle in *Khoon Chye Hin v Public Prosecutor* [1961] 1 MLJ 105b ('*Khoon Chye Hin*'), as applying to the facts of the present case. In this regard, the QOL asks:

(a) QOL 2:
Whether the principles stated by Thompson CJ in *Khoon Chye Hin v Public Prosecutor* [1961] 1 MLJ 105b and applied widely as a governing principle in both Malaysia and Singapore to determine the evidence of a witness who has changed his/her testimony, would also apply to a witness who has recanted his/her evidence?

[39] Hence, the acceptance of mother's recantation and her post-recantation testimony and the rejection of her prior recantation evidence given on oath by the High Court were held by the Court of Appeal to amount to a serious mistrial, resulting in:

(a) no recantation in fact took place;

(b) mother's prior recantation evidence of 29 days stands; and

(c) mother's post recantation evidence should be ignored.

[40] In relation to this finding, the following QOL was framed:

(a) QOL 3:
Arising from the above questions, whether the Court of Appeal had acted correctly in law in selecting, without more, the first part of the evidence of the witness (which was recanted) as admissible for considering the merits of the case and rejecting the latter part of her evidence as unacceptable?

OUR VIEW

Defining recantation — its meaning, procedure and effect

[41] In defining recantation as a formal withdrawal of earlier testimony, involving a two-staged application, the Court of Appeal also indicated that the effect of a recantation is a dismissal or rejection of all evidence, prior and post recantation, particularly where cross-examination did not take place, as viewed by the Court of Appeal in these appeals. The absence of cross-examination of the mother by Henry was indeed one of the major reasons why the Court of Appeal considered only the prior recantation.

[42] In this respect, Gary argued that recantation, as a rule of evidence, is nowhere defined in the Evidence Act 1950 ('the EA 1950'). There is no formal established procedure for it prescribed therein, or even, at common law. Neither it is found, as was submitted, as an established law in any leading textbooks on the law of evidence. Gary maintained the position that recantation of evidence of a witness during the trial is a matter of assessment by the trial judge, as it is nothing more than a witness changing his/her evidence, who is to be regarded, if at all, as an unreliable or untruthful witness.

[43] Interestingly, Henry, as does Gary in respect of the QOL 1 took the similar position that there is no established rule or procedure regarding recantation. Notwithstanding, Henry argued that in the absence of such entrenched rule, the procedure governing impeachment of a witness ought to

be followed and accepted, and in the case of recantation, the court must exercise caution in evaluating the evidence.

[44] We noted that the dictionary meaning of the terminology indicated a consensus that recantation is a form of retraction or withdrawal of prior testimony. *Black's Law Dictionary* (8th Ed) 2004, p 3974 defines 'recantation' as the withdrawal by a witness of his/her prior testimony:

> 1. To withdraw or renounce (prior statements or testimony) formally or publicly; 2. To withdraw or renounce prior statements or testimony formally or publicly.

[45] In similar vein, the *Cambridge Dictionary* defines 'recant' as 'to announce in public that your past beliefs or statements were wrong and that you no longer agree with them' and the word 'recantation' is defined as 'the act of announcing in public that your past beliefs or statements were wrong and that you no longer agree with them'. This definition was adopted by the Court of Appeal in these appeals.

[46] In fact, dictionaries' meaning of the words recantation and retraction suggest that both terminologies are, linguistically, connoting the same meaning and purpose, and can be used interchangeably. *Black's Law Dictionary* defines 'retraction' as '1. The act of taking or drawing back; 2. The act of recanting; a statement in recantation; A withdrawal of a renunciation ...'; while Merriam-Webster defines 'retract' as 'to draw back or in; to take back, withdraw or disavow', and 'retraction' is defined as 'an act of recanting; an act of retracting; the ability to retract'.

[47] As far as our law of evidence is concerned, we agree, that neither the word 'recantation' nor the procedures related to it are expressly provided for in the EA 1950. The word recantation is, as a matter of fact, not a commonly used terminology in so far as our domestic legal framework and literature are concerned.

[48] That having been said, it did not escape our notice that Malaysian judges have, in fact, dealt with the word recantation in relation to witnesses withdrawing their previous statement and/or testimony (*Projek Lintasan Kota Sdn Bhd v Wisma Denmark Sdn Bhd & Anor* [2012] MLJU 837 (HC); *Bingkul Timber Agencies Sdn Bhd V The Government Of The State Of Sabah* [1995] MLJU 73 (HC); *Gurisha Taranjeet Kaur (an infant suing by her father and litigation representative, Taranjeet Singh s/o Bhagwan Singh) & Anor v Dr Premitha Damodaran & Anor* [2020] 9 MLJ 409 (HC); *Clarity Heights Sdn Bhd V Syarikat Samland Sdn Bhd* [1999] 4 MLJ 485 (HC)).

[49] Sometimes, the word recantation and retraction are used interchangeably to indicate a withdrawal or renouncing of prior statements or testimony formally or publicly by a witness (*Pan Malaysian Pools Sdn Bhd v Kwan Tat Thai and Anor* [2010] MLJU 1110; [2010] 1 LNS 968 (HC)). This is also seen in *Pileggi*, a case cited and referred to by the Court of Appeal in deciding these very cases before us, where it stated that:

> [50] In a case such as the present, where the fresh evidence involves the retraction or recantation of sworn evidence given by the witness at the trial, there is every reason for great care to be taken in assessing the credibility and the cogency of the fresh evidence ...

[50] To reiterate, it was held by the Court of Appeal that recantation 'involved two-staged application where leave of the court is sought to recall the witness. Sufficient and satisfactory reasons must be shown for the recall of the witness, and where satisfied, the witness is recalled and the recantation takes place'. The Court of Appeal stated further in the later part of its judgment that, 'The court must never allow any witness, who has already testified under oath to tell the truth, to change their stance without credible, satisfactory explanation; otherwise the administration of justice will be seriously undermined'.

[51] While it is not clear what is the exact basis for the Court of Appeal in coming to a conclusion on the two-stage application as a procedure in recantation, we observed that the Court of Appeal made such statement immediately after referring to the dictionary meaning of recantation, which was argued by Gary as an error as that definition is not a legal definition.

[52] That said, the Court of Appeal had also referred to and cited foreign authorities when dealing with the issue of recantation. They are cases from Australia: *Pileggi; Davies & Cody;* and *Gale*; United Kingdom: *Flower*; and New Zealand: *The Queen*. These authorities were relied on as the basis upon which a careful scrutiny and considerable circumspection must be undertaken on the fresh evidence given on recantation so as to guard against any possibility of manipulation and abuse in the administration of justice.

[53] It is worth noting that, when citing *Gale* and *Flower*, the Court of Appeal viewed that although recantation of witness was pleaded as a ground for a new trial, it held that, 'The principles apply equally' that 'one must be cautious and require satisfactory reasons to be furnished for the change of evidence, before the witness is allowed to testify anew'.

[54] Thus, we understand that these foreign cases were the basis, inter alia, upon which the two-stage application procedure for recantation was held to be the correct procedure to be adopted, according to the Court of Appeal. In

effect, procedurally, leave of the court must first be obtained to adduce fresh evidence, and that there must be sufficient and satisfactory reasons shown to justify the granting of such leave.

[55] Having analysed those foreign cases, we observed two important points — first they are all criminal cases; and secondly that recantation took place at the appellate level which is after the conclusion of trial, and which was pleaded as a ground for a new trial or for setting aside a conviction, by way of producing fresh, extrinsic evidence — in the form of a sworn declaration (*Davies & Cody*); an affidavit (*Pileggi*; *Flower*; and *The Queen*) and a note (*Gale*) — all of which were tendered at the leave stage for the purpose of the application to adduce fresh evidence for use at the appeal. Hence, the need to apply for leave from the appellate court to adduce fresh evidence in such peculiar circumstance was apparent and inevitable.

[56] In fact, this procedural aspect of adducing fresh evidence at the appellate level is trite, in so far as our domestic procedural law is concerned (for eg s 69 (3) of the CJA; r 7 of the Rules of the Court of Appeal 1994; O 55 r 7 of ROC 2012). It is reflective of the entrenched procedure deduced and adopted from the oft-cited decision of the English Court of Appeal in the case of *Ladd v Marshall* [1954] 3 All ER 745.

[57] In the present appeals before us, the alleged recantation occurred, not at the appellate stage, but during the trial itself, when the mother had completed her cross-examination and after she had foregone her right of re-examination, which, on the facts are arguably distinguishable from those said foreign cases cited by the Court of Appeal. Gary argued on this basis, that post trial recantation is an appellate question whereas in-trial recantation is an assessment question for the trial judge. Hence, it was argued that by relying on the post-trial recantation cases, the Court of Appeal had made a fundamental error, which, on that material flaw alone, the decision of the Court of Appeal on recantation cannot stand, and ought to be set aside.

[58] In this regard, we agree that recantation or retraction of evidence occurring during the trial is a matter for assessment of evidence of the alleged unreliable or untruthful witness. As both parties before us had acknowledged that there is no established rule of evidence or procedure relating to recantation in our domestic law thus far, the Court of Appeal's decision on the two-stage application procedure; and the effect of a recantation would be the total rejection of the evidence of the recanted witness, are incorrect. On the contrary, and with respect, great care and scrutiny ought to be exercised in assessing the credibility and the cogency of the evidence following a recantation.

[59] In this regard, we shall answer QOL 1 in the negative.

What to admit and what to reject? Applicability of the principle in Khoon Chye Hin

[60] *Khoon Chye Hin* does not deal with recantation per se, but with a situation where a witness is shown to be inconsistent and contradicting in the course of giving evidence.

[61] *Khoon Chye Hin* held that such witness is not a reliable witness and as a matter of prudence, the rest of his evidence must be scrutinised with great care and caution. However, the evidence of the witness need not be rejected as a whole. Thomson CJ held that:

> In our view this is wrong and calculated to mislead a jury. If a witness demonstrably tells lies on one or two points then it is clear that he is not a reliable witness and as a matter of prudence the rest of his evidence must be scrutinised with great care and indeed with suspicion. To say, however, that because a witness has been proved a liar on one or two points then the whole of his evidence 'must in law be rejected' is to go too far and is wrong.

[62] The approach taken in *Khoon Chye Hin* was adopted by the Federal Court in *Adiswaran a/l Tharumaputrintar v Public Prosecutor and other appeals* [2014] 3 MLJ 228, where, in dealing with the issue of the contradictions in the evidence of PW10 and PW19, it was held that:

> [70] It is trite law that the fact that there are discrepancies in a witness's testimony does not necessarily make him an unreliable witness and make the whole of his evidence unacceptable. It is open to the court having observed the demeanour of the witness and after careful consideration of such discrepancies to accept part of the witness's evidence it considers true (*Mohamed Alias v Public Prosecutor* [1983] 2 MLJ 172). If a witness demonstrably were to lie on one or two points, then it is clear that he is not a reliable witness and as a matter of prudence, the rest of his evidence must be scrutinised with great care, and indeed, with suspicion. To say, however, that because a witness has been proved to be untrue on one or two points then the whole of his evidence 'must in law be rejected' is going too far and is wrong (*Khoon Chye Hin v Public Prosecutor* [1961] 1 MLJ 105b). It is the duty of the court to sieve through the evidence and to ascertain which part of the evidence incriminating the accused could be accepted. (*Tua Kin Ling v Public Prosecutor* [1970] 2 MLJ 61).

[63] The position in *Khoon Chye Hin* was also adopted by the Singaporean courts. In *Alwie Handoyo v Tjong Very Sumito and another and another appeal* [2013] SGCA 44; [2013] 4 SLR 308, the Singaporean Court of Appeal has, in dealing with issue of credibility of witness with contradictory statements, referred to *Khoon Chye Hin.* VK Rajah JA succinctly discussed the issue and while also referring to other authorities, held that:

> [59] The court should be wary of the maxim *falsus in uno, falsus in omnibus* — false in one thing, false in everything. That the evidence of a witness need not be rejected *in toto* simply because it is unreliable or untrue in some parts is firmly established. In *Chai Chien Wei Kelvin v Public Prosecutor* [1998] 3 SLR(R) 619 at [72], this

court cited with approval the dicta of Raja Azlan Shah FJ (as he then was) in *Public Prosecutor v Datuk Haji Harun bin Haji Idris (No 2)* [1977] 1 MLJ 15 at 19:

> There is no rule of law that the testimony of a witness must either be believed in its entirety or not at all. A court is fully competent, for good and cogent reasons, to accept one part of the testimony of a witness and to reject the other. It is, therefore, necessary to scrutinize [sic] each evidence very carefully as this involves the question of weight to be given to certain evidence in particular circumstances.

...

This principle, though applied usually in criminal proceedings, no doubt has equal application in civil cases. *Khoon Chye Hin* was cited with approval by Yong CJ in *Teo Geok Fong v Lim Eng Hock* [1996] 2 SLR(R) 957 at [44], which was in turn recently applied by Belinda Ang J in *Trans-World (Aluminium) Ltd v Cornelder China (Singapore)* [2003] 3 SLR(R) 501 at [22].

[61] The correct approach that the court should adopt in such cases is to appraise the witness's entire evidence in the context of all the other evidence and circumstances of the case. A flawed witness may be telling the truth on some matters: *Public Prosecutor v Chee Cheong Hin Constance* [2006] 2 SLR(R) 24 at [103]. It is only where the grain and the chaff are so inextricably linked that evidence from a witness who has been shown to be extremely unreliable may perhaps be discarded *in toto*; the mere fact that some part of a witness's evidence is found to be deficient, unreliable or simply untrue is usually insufficient to justify the rejection of his or her evidence *in toto*.

[64] On the questions of the applicability of *Khoon Chye Hin* and the approach taken by the Court of Appeal as questioned in the second and the third QOLs, we shall deal with these matters together.

[65] To reiterate, the High Court considered that the mother had recanted and hence, her evidence post recantation was accepted while rejecting all her prior recantation evidence 'after having scrutinised with great care her testimony and after comparing it with the undisputed contemporaneous documents'. The Court of Appeal however had held otherwise, ie that there was no recantation, and hence the mother's evidence from days 1–29 ought to be admitted and assessed properly. It was the position taken by Henry that even if the Court of Appeal was wrong and that there was recantation, the mother ought to be found as an incredible witness and her evidence post recantation ought to be rejected *in toto* as it was never really tested in cross-examination by Henry.

[66] In this respect, Gary argued that the practice of compartmentalising of a witness' evidence by accepting one segment and rejecting the other *in toto* is unquestionably wrong in law. That is because the court had moved away from the old total rejection approach to that of assessing the entirety of the evidence,

even that of untruthful or unreliable witness which has been consistently adopted by this court and Singapore in *Khoon Chye Hin*. Gary submitted that the mother's evidence in material parts must be assessed in totality by testing it against other contemporaneous documentary evidence, particularly, in the case of SSA which was backed by corroborative documentary evidence, unlike the constructive trust issue which was based entirely on witnesses' oral testimony.

[67] We must highlight that in this regard, Henry never submitted that the principle of evidence in *Khoon Chye Hin* did not apply. In fact, Henry went on to submit to the extent of saying that even in the case of hostile witness or where the evidence has been impeached, the whole of the impeached evidence is not excluded *in toto* (*Hj Elias bin Hanan v Hj Md Noor bin Salleh (Azizah bte Hj Hanan & Ors, Interveners)* [2002] 3 MLJ 432; *Safri bin Koboy & Anor v Public Prosecutor* [2000] 1 MLJ 656; *Public Prosecutor v Mohd Ali bin Abang & Ors* [1994] 2 MLJ 12; *Kwang Boon Keong Peter v Public Prosecutor* [1998] 2 SLR 592; [1998] 2 SLR(R) 211; *Osman bin Ramli v Public Prosecutor* [2002] 4 SLR 1; [2002] 2 SLR(R) 959; *Public Prosecutor v Somwang Phatthanasaeng* [1990] 2 SLR(R) 414 were cited).

[68] Henry's major complaint was that he was not allowed to cross-examine the mother on her allegations of lies and coaching made against Henry in her police report P41. And as such, Henry had argued that the mother's evidence which was not subjected to cross-examination could not be acted upon; and that her evidence prior to recantation was to be accepted, as it was tested by cross-examination. As such, Henry submitted that the Court of Appeal had employed the correct approach.

[69] In opposition to such argument, Gary had submitted that the Court of Appeal erred when stating that Henry was not allowed at all to cross-examine the mother. This is because, according to Gary, the trial judge never dismissed or disallowed Henry or the former counsel to cross-examine on the mother's change of stance pursuant to her police report P41. In the words of Gary, Henry had abandoned the cross-examination issue, and instead had opted to apply, via encl 152 to: (a) to adduce new evidence in the form of video recordings as well as transcripts of those video recordings, featuring the mother communicating with various persons, including her former counsel; and (b) to subpoena the mother. We noted, from the notes of proceedings before the High Court judge that this application was properly heard and dismissed. On top of the solicitor-client privilege communication ground, the trial judge was of the view that the case was between the plaintiffs and the defendants and not between Henry against the mother. In fact, the mother had, through her new counsel applied to set aside the said subpoena, and which was granted.

[70] We have perused carefully the notes of evidence recorded from 7 January 2013 when the mother was recalled to tender her report and was cross-examined by Gary, until 11 August 2014 where encl 152 was decided, and we were satisfied, that Henry, through his counsel never cross-examined the mother on the recanted evidence. However, that was not because he was not allowed to do so. The trial judge never made any ruling disallowing Henry to cross-examine the mother. In fact, the trial judge had granted both parties the chance to research on the matter. However, the issue was left unsubmitted following the disqualification of Henry's former counsel, and consequently undecided due to the change of approach undertaken by Henry's new counsel in relation to the mother's change of stance, when he applied, via encl 152 to subpoena the mother; and to adduce new evidence. We are however not dealing here with the merits of the trial judge's dismissal of that application.

[71] Thus, in the circumstances, it was open to the trial judge to assess and examine the entire evidence before him, and indeed, it was emphasised before us on behalf of Gary, that the trial judge had so examined and scrutinised the evidence of the mother with great care, while at the same time appreciating it with the other undisputed contemporaneous documentary evidence. With respect, it is our view that such approach, which was justifiably explained, could not amount to an assessment of evidence leading to a decision that was 'plainly wrong'.

[72] As such, although recantation or retraction of evidence may not be entirely the same as mere inconsistencies or discrepancies or contradictories in one's evidence, they all share one commonality, namely, changes made to prior evidence. Hence, there may be lies and truths in either of the prior to or post recantation/retraction which the court is duty- bound to assess, to examine and to decide which of those evidence is more probable than not, is the truth — independently or with the support of other evidence.

[73] Based on that shared criterion, we are of the view that adopting *Khoon Chye Hin* in assessing the credibility of evidence given on recantation during trial is not entirely incorrect. Whether to accept or reject the evidence given prior to or post recantation, there must be an assessment of that evidence in the light of other credible evidence on material issues/facts. And that is because of the inherent nature of the suspicion arising out of a recantation. Premised on that, great care and caution must always be applied in such an exercise.

[74] Thus, although *Khoon Chye Hin* does not deal with recantation per se, we agree that the principle distilled from that case had laid down the correct approach to be followed. It is this. It would ultimately boil down to a matter of proper appreciation and assessment of the evidence under scrutiny by the court

when dealing with a witness who has recanted, whose credibility is being impugned.

[75] In that regard, we answer QOL 2 in the affirmative.

[76] As for QOL 3, we find it unnecessary to answer, as the exercise of compartmentalising the evidence was done by both the courts below, albeit on different reasons. The trial judge accepted the post recantation 'after having scrutinised with great care her testimony and after comparing it with the undisputed contemporaneous documents' while the Court of Appeal accepted the prior recantation evidence as it was unsafe to act on untested uncross-examined evidence.

[77] Notwithstanding, it was emphasised on behalf of Gary that no matter what the final outcome of the recantation or our answers to the related QOLs, it was the duty of the appellate court to see, whether or not Henry's evidence stood the test of reliability, in respect of the forgery or constructive trust, and proven to be credible on the balance of probabilities. We were urged to not forget that Henry's evidence in respect of the SSA was simply that his purported signature was allegedly a forgery, that he did not sign it, that such factum was *non est factum,* and as such, his evidence ought to be tested against all other evidence regardless of the recantation issue. As in the case of Gary, even without the mother's evidence, there are sufficient other credible evidence for Gary to prove his claims of specific performance of the SSA on the balance of probabilities.

[78] Henry submitted that even without the recantation issue, he had proved his claims on the balance of probabilities, primarily based on the numerous circumstantial evidence, pointing to one and only conclusion that there was never any oral or written agreement as regard the SSA.

Existence and validity of the share sale agreement

[79] There are altogether six QOLs in this respect, with some overlapping in the QOLs as granted on the issues pertaining to interested witness and expert witness in both appeals by Gary and Khor. In this regard, to dispel any doubt, any reference by us to Gary's submissions is similarly a reference to Khor's.

[80] The High Court in these appeals found that based on the oral testimony of Henry, Gary, lawyer Khor and the mother together with documentary evidence, Gary had, on the balance of probabilities, proved the existence of the 2001/2002 split agreement and the 2005 SSA even without resorting to experts' evidence.

[81] Specifically, Henry admitted to having signed a document containing the revised terms of the initial split agreement as per exh D53B. Other compelling evidence are Henry's written instructions to lawyer Khor in D54, D55 and D58, among others, for the preparation of the SSA. Other circumstances indicate that Henry had sold his shares and interests in the family companies to Gary by resigning as a director of JAC and HL; not being reelected as a director of WF; released as a guarantor for loans taken by JAC and HL; and not contributing to or being involved in the development of Auto-City since 2003 to 2009 in order to do his business in China, Myanmar and Indonesia.

[82] However, on appeal, the Court of Appeal did not agree with the above findings because:

(a) there was a lack of proof of payments or performance under the SSA, on the assumption that there is a valid SSA;

(b) the absence of requisite share transfer form signed by Henry which generally evidences a sale;

(c) the evidence of the mother for 29 days that there was no sale of shares to Gary and that Henry did not sign the SSA at Khor's office; and

(d) new share certificates issued to Henry in 2007.

[83] The Court of Appeal on the other hand considered Khor's note as merely a misnomer, and holds little value as corroborative evidence. The split agreement was, according to the Court of Appeal, at best a piece of evidence to reflect that Henry and Gary had negotiated on splitting the business, but it cannot be said to amount as representing the sum total of the agreed terms.

STANDARD, BURDEN AND ONUS OF PROOF

[84] The High Court held that the standard of proof required to prove civil fraud as in these appeals, was one beyond reasonable doubt. *Asean Security Paper Mills Sdn Bhd v CGU Insurance Bhd* [2007] 2 MLJ 301; and *Seek Siew Nygt & Anor v Firent Management Services Sdn Bhd & Ors* [2007] 1 MLJ 171 were cited as the authorities. Based on the evidence of Khor, the documentary evidence, and particularly following the mother's recantation, the High Court found that the allegation of fraud and/or conspiracy mounted by Henry against the counsel was unfounded, and was therefore not borne out.

[85] As regards the SSA, the High Court placed the burden of proof on Henry to prove the SSA as a product of fraud and/or conspiracy; and that Henry's signature was a forgery. The High Court held that:

> Gary has to prove on a balance of probabilities that the signature of Henry in the

SSA was genuine. It is for Henry to prove beyond reasonable doubt that his signature is a forgery.

[86] In this respect, the Court of Appeal corrected that the standard of proof for fraud is on the balance of probabilities and not one that is beyond reasonable doubt. *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1; [2015] 7 CLJ 584 ('*Sinnaiyah*'); *Veheng Global Traders Sdn Bhd v Amgeneral Insurance Berhad* [2017] 7 CLJ 715 were cited as stating the correct legal position.

[87] The Court of Appeal also held that the burden of proof remains with Gary as the plaintiff to prove the validity and the genuineness of the SSA. The COA viewed that 'where the genuineness of the SSA is put in issue, the burden lies on the plaintiff of proving not only the execution, but the bona fides of the SSA. A party who asserts the validity of a document relied on, here the SSA, is asserted and produced by Gary; he bears the onus of proving its validity. If the case is not established, or the burden discharged, then the claim should be dismissed, regardless of whether the defence of forgery had or had not been made out'. *Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd* [2017] 4 MLJ 697 was cited ('*Letchumanan*'). The Court of Appeal held that 'It is only when Gary makes out a prima facie case that the burden shifts to Henry'. The Court of Appeal's reference to *Letchumanan* brought to the framing of the QOL as follows:

(a) QOL 1 (Khor's case):
Whether the Court of Appeal misdirected itself with regard to the principles set out in *Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd* [2017] 4 MLJ 697 in relation to whether the onus of proof lies with the party asserting forgery or whether the onus of proof lies with the counter party relying on the existence of the said instrument or document to prove its validity and genuineness?

OUR VIEW

[88] First and foremost, we must clarify that *Sinnaiyah* has settled the law on the standard of proof required to prove fraud in a civil claim, and that standard is one, on the balance of probabilities, and not one, beyond reasonable doubt. On this aspect, we agree that the Court of Appeal had rightly corrected the wrong standard that was applied by the High Court.

[89] However, on the question of who in law, shall bear the burden to prove forgery, specifically in this case, the alleged forgery of Henry's signature, we are of the unanimous view that the Court of Appeal had fallen into error in placing

that onus on Gary, instead of on Henry. Clearly, Henry was alleging that his signature on the SSA was a forgery. In such a circumstance, because it was Henry who had so alleged, he bore the onus of proving that the signature was a forgery. There is a Latin maxim that reads, *onus probandi incumbit ei qui dicit, non ei qui negat,* that translates to mean, the burden of proof lies with the one who speaks, not the one who denies the same.

[90] While Henry submitted that the Court of Appeal was correct in its approach in this regard, Gary argued that the Court of Appeal had erred when placing the onus on Gary to disprove forgery despite the fact that forgery was raised by Henry. The two main reasons advanced by Gary are: (a) the misapplication of the principles in *Letchumanan*; and (b) the peculiarity of the facts and circumstances in *Letchumanan* which are wholly distinguishable with the present case.

[91] Gary specifically highlighted that the Court of Appeal, when citing para [57] in *Letchumanan* that Gary 'to show a prima facie case, and if he leaves it imperfect, the court will not assist him', had failed to consider the remaining sentences in that same paragraph that stated 'When, however, the defendant, or either litigant party, instead of denying what is alleged against him, relies on some new matter which, if true, is an answer to it, the burden of proof changes sides; and he, in his turn, is bound to show a prima facie case at least and, if he leaves it imperfect, the court will not assist him'. In this regard, we agree with Gary's contention that the Court of Appeal had misread this aspect of *Letchumanan*'s decision, thereby misdirected itself on this crucial issue of the shifting of the onus of proof in its judgment.

[92] In order to better appreciate *Letchcumanan*, we shall reproduce the relevant paragraphs as cited to us. *Letchumanan* held that:

> [57] The rule is that 'the onus of proof of any particular fact lies on the party who alleges it, not on him who denies it; *et incumbit probation qui decit, non qui negat, actori incibit probation* ... The plaintiff is bound in the first instance, to show a prima facie case, and if he leaves it imperfect, the court will not assist him. Hence the maxim *potior est condition defendantis*. A plaintiff cannot obviously advantage himself by the weakness of the defence. A plaintiff's case must stand or fall upon the evidence adduced by him. When, however, the defendant, or either litigant party, instead of denying what is alleged against him, relies on some new matter which, if true, is an answer to it, the burden of proof changes sides; and he, in his turn, is bound to show a prima facie case at least and, if he leaves it imperfect, the court will not assist him. *Reus excipendo fit actor*'.
>
> ...
>
> [60] It would pan out that the respondent, who was the plaintiff, had both the 'burden of proof' to make out a prima facie case as well as the initial onus of proof to adduce evidence to prove the claim. The onus of proof would only shift to the

A appellants if the respondent had made out a prima facie case. That remained so even though forgery was pleaded. 'Now, there is a great distinction between a civil and criminal case, where a question of forgery arises. *In a civil case, the onus of proving the genuineness of a deed is cast upon the party who produces it and asserts its validity. If there be conflicting evidence as to the genuineness, either by reason of alleged forgery or otherwise, the party asserting the deed must satisfy the jury that it is genuine.* (Emphasis added.) The jury must weigh the conflicting evidence, consider all the probabilities of the case, not excluding the ordinary presumption of innocence, and must determine the question according to the balance of probabilities ... 'Where the genuineness of a deed on which the plaintiff sues, is put in issue, the burden lies on the plaintiff of proving not only the execution, but the bona fides of the deed ...'

...

[61] A plaintiff has the onus to begin the case, even if the defence pleads fraud ... Unless the cause of action is admitted by the defendant (see illustration (b) of s 102 and *Wee Yue Chew v Su Sh-Hsyu* [2008] SGHC 50, where the defendant admitted the cause of action and pleaded payment and so must prove that the admitted claim had been discharged by payment), a plaintiff has the burden of proof as well as the initial onus to prove the claim, albeit that the defence is forgery.

[62] In the instant case, the cause of action was not admitted. Given so, the respondent had to discharge the burden as well as the initial onus before the onus could shift to the appellants. If the respondent had not discharged that burden and onus of proof, then the claim should be dismissed, regardless of whether the defence of forgery had or had not been made out. *Potior est condition defendantis* ...

[93] Having read the decision in *Letchumanan* in its entirety, we are satisfied that there ought not to be a confusion as to the question of burden of proof. *Letchumanan* must also be read in its proper context in order to better understand how this court had arrived at the conclusion that it did. Salleh Abas, FJ in *International Times & Ors v Leong Ho Yuen* [1980] 2 MLJ 86 ('*International Times*') which was one of the many authorities referred to in *Letchumanan* had clarified that:

... it is necessary to bear in mind the distinction between the two senses in which the expressions burden of proof and onus of proof are used (*Nanji & Co v Jatashankar Dossa & Ors AIR* 1961 SC 1474 1478 and *Raghavamma v Chenchamma AIR* 1964 SC 136 143). The first sense, signified by the expression burden of proof such as referred to in s 101 of the Evidence Act is the burden of establishing a case and this rests throughout the trial on the party who asserts the affirmative of the issue ...The second sense referred to as onus of proof, on the other hand, relates to the responsibility of adducing evidence in order to discharge the burden of proof. The onus as opposed to burden is not stable and constantly shifts during the trial from one side to the other according to the scale of evidence and other preponderates. Such shifting is one continuous process in the evaluation of evidence. According to ss 102 and 103 of the Evidence Act, if the party with whom this onus lies whether initially or subsequently as a result of its shifting does not give any or further evidence or gives evidence which is not sufficient, such party must fail ...

[94] *Letchumanan* had in fact further detailed out the meaning and application of burden of proof in ss 101, 102 and 103 of the EA 1950. To our mind, there is no necessity for us to repeat what has been succinctly and correctly stated therein.

[95] That said, we are of the considered view that having analysed *Letchumanan*, it was in fact, a matter of the application of the law relating to the burden of proof to the peculiar facts and circumstances of that case, that this court in *Letchumanan* had held that the plaintiff in that case bore the initial burden of proving the validity and genuineness of the document in question, irrespective of the forgery issue raised by the defence. Based on the factual matrix in *Letchumanan*, this court there had decided that Secure Plantation Sdn Bhd, who was the plaintiff in that case bore the burden of proving the validity of the impugned power of attorney ('PA'). That was because, in its claim for specific performance of the SPA executed by one Kalidas who was not the registered proprietor of the land, the plaintiff had pleaded that Kalidas was the lawful attorney; and asserted that the PA was valid. In other words, the basis of the claim by the plaintiff for specific performance of the SPA was, primarily, on the alleged validity of the PA.

[96] There is no doubt that the plaintiff bears the legal burden to prove its claim throughout his case on the balance of probabilities. However, as *Letchumanan* has rightly stated in para [57] that when the adverse party, ie, the defendant raises some new matter, the burden changes sides, and it becomes his to discharge. In this *Letchumanan*'s case however, we noted that the issue of proving forgery did not eventually arise as the PA was held to be invalid as it has not been authenticated in accordance with s 3 of the Powers of Attorney Act 1949. Specifically, the court held that:

> [63] There is no law which says that a claim automatically succeeds if the defence fails. A claim succeeds only if a prima facie claim is made out or the cause of action is admitted, and there is no defence. For the instant claim to succeed, the validity of the impugned PA must first be proved. 'The burden of proof under s 102 of the Evidence Enactment is upon the person who would fail if no evidence at all were given on either side, and accordingly the plaintiff must establish his case. If he fails to do so, it will not avail him to turn round and say that the defendant has not established his' (*Selvaduray v Chinniah* [1939] 1 MLJ 253 per Terrel Ag CJ). To say that the impugned PA was valid on account of the fact that forgery was not proved was the wrong approach altogether to address the validity of the impugned PA. If the impugned PA were not valid, then the claim for specific performance must be dismissed, regardless of whether forgery was proved ... As the propounder, the respondent had the initial onus of proof to show that instrument of transfer upon which he acquired title was executed by the lawful attorney of the first appellant in the exercise of powers granted by a valid power of attorney. If the respondent could not show that the impugned PA was valid, then the instrument of transfer was defective. If the instrument of transfer was defective, then it would follow that the

A title of the respondent was obtained by a void instrument. Title could not pass to the respondent if the instrument of transfer were not executed by the first appellant or lawful attorney. In the instant case, the respondent relied on a power of attorney, which, on its face, without the form of authentication, was not valid. The burden of proof to establish the claim was not discharged. The impugned PA had no validity.
B In the result, the instrument of transfer was void.

...

[65] Both courts below overlooked s 101 of the Evidence Act, which was the overarching provision before ss 102 and or 103 would enter the equation. 'The
C elementary rule in onus is always on the plaintiff and if he discharges that onus and makes out a case which entitles him to a relief, the onus shifts to the defendant to prove those circumstances, if any, which would disentitle the plaintiff to the same' ... Unless the respondent had made the first move, namely, proved validity of the impugned PA, the appellants was not foisted with any onus to make any
D countermove, namely, prove forgery to defeat the claim. It was entirely wrong to award game set and match, so to speak, to the respondent when the respondent, who was the plaintiff, had not even served the first ball, namely, proved validity of the impugned PA, which then and only then would require the appellants to return the ball, with proof of forgery. The respondent asserted that the SPA and the instrument of transfer were executed by Kalidas, the lawful attorney of the
E registered proprietor. But as the impugned PA was not valid, then, as said, the claim should have been dismissed. It was as simple as that.

[97] In short, in determining who bears the burden of proof of a particular
F issue of fact, one looks at what is pleaded or asserted. On the side of the plaintiff, we look at what the claim is and what the premises of the claim are. When the evidence is presented, it is then a matter of assessment or evaluation of that evidence in the course of determining whether the burden has been discharged. If what he claims is not proved, it does not matter whether or not
G the other party succeeded in rebutting or otherwise proving its defence. This is exactly what happened in *Letchumanan*. The proper placement of, and the shifting of the burden or onus of proof are real and indeed crucial, to litigants in a claim. They are legal dictates. A misplacement or misapplication of the burden or onus on a litigant can lead to a miscarriage of justice and is an error
H of law.

[98] In the present appeals, we observed one important fact. It is this. The assertion of forgery of Henry's signature and the validity of the SSA were raised in two circumstances — as a defence by Henry in Gary's SSA's suit for specific
I performance; and as a pleaded fact by Henry in his statement of claim against Khor for a declaration that the said SSA was invalid/void on the ground of conspiracy/fraud. Both, as a defendant in the SSA and as a plaintiff in the conspiracy/fraud claim, Henry disputed the validity of the SSA and his signature, based on his alleged forgery of the same.

[99] Thus, if we are to apply *Letchumanan*, and by considering the fact that the forgery of the signature was asserted by Henry in his claim against Khor, to place the burden on Gary, or even Khor, to disprove such assertion was legally wrong, because it was Henry who asserted or pleaded the validity point and the allegation of forgery of his signature in its claim against Khor.

[100] In these appeals before us, the trial judge was satisfied, after evaluating the evidence that Gary had discharged the burden of proving his claim that the SSA existed and that it was a valid agreement. Hence, the burden to prove forgery was correctly imposed on Henry as such assertion of forgery emanated from him in his defence against Gary's claim. Thus, where it was alleged that the SSA bore the forged signature of Henry, the onus would then shift to Henry to prove the alleged forgery of his signature. On this point, we agree with Gary that the burden of proof is on Henry who had alleged forgery and not on Gary.

[101] It is therefore our considered view that the learned justices in the Court of Appeal had misdirected themselves on the burden of proof relating to the allegation of forgery. This misdirection arose when they did not properly address or direct their mind on the question of burden of proof in *Letchumanan*, particularly, in para 57 as discussed above. Had they properly directed their mind to the omitted portion of the paragraphs, it would have been clear to them that in the circumstances obtaining before them as in these appeals, they would have arrived at the conclusion that when one 'relies on some new matter which, if true, is an answer to it, the burden of proof changes sides ...' and as such, this new matter, namely forgery which was raised by Henry in his statement of defence, if successful, would be a complete answer to Gary's case. And that requires that Henry would have to discharge the burden of proving forgery which burden to be discharged has shifted to him.

[102] Equally important to recall is that, Henry has asserted the issue of forgery in his Statement of Claim against Khor. Before us, therefore, it was Henry who spoke about his signature having been forged. The *'onus probandi'* rightly sits with him, to be discharged by him, on the balance of probabilities, that his signature was forged, failing which, his claim and his defence must necessarily fail.

[103] We therefore answer the QOL relating to the burden and onus of proof and the misapplication of *Letchumanan* by the Court of Appeal in the affirmative.

A THE CREDIBILITY AND RELIABILITY OF INTERESTED AND EXPERT WITNESS

[104] Raja Azlan Shah J (as he then was) observed in *Karthiyayani & Anor v Lee Liong Sin & Anor* [1975] 1 MLJ 119 at p 120, that:

B

> If a witness is independent, ie, if he has no interest in the success or failure of a case and his evidence inspires confidence of the court, such evidence can be acted upon. A witness is normally to be considered independent unless he springs from sources which are likely to be tainted. If there are circumstances tending to affect his impartiality, such circumstances will have to be taken into account and the court will have to come to a decision having regard to such circumstances. The court must examine the evidence given by such witness very carefully and scrutinize all the infirmities in that evidence before deciding to act upon it.

C

[105] In this respect, both parties had called handwriting experts to testify on the signature of Henry which Henry had alleged to be a forgery. Gary's expert ('DW2') concluded, in his report, that the impugned signature and the specimen signatures provided as comparison materials are 'of a common authorship'. The government expert ('PW5') called by Henry, on the other hand reported that due to some differences in handwriting characteristics, the 'questioned signature may not have been written by the writer of the specimen'.

D

E

[106] The High Court preferred the evidence of DW2 to that of PW5 because, in its assessment, the report and evidence of DW2 was more comprehensive and reliable, based on the following three reasons:

F

Reliability of the specimen signatures

[107] In DW2's analysis, 15 specimens of Henry's signature were taken from official documents and agreements which were not disputed by Henry. The analysis by DW2 concluded with the genuineness of the impugned signature.

G

[108] On the other hand, the specimen signatures analysed by PW5 were that of Henry's signatures which he signed in front of the police after he lodged the police report following Gary's suit for specific performance of the SSA (specimen D) and six other documents (specimen E). In this regard, the trial judge doubted the reliability of the specimen signatures for the purpose of comparison, in particular specimen D, given the circumstances of the case that Henry could have deliberately disguised his signatures — a possibility that PW5 herself did not dismiss (see para 103 of the High Court grounds of judgment).

H

I

The production of hard evidence

[109] All the specimen signatures relied on by DW2 in his analysis were produced in the report and were referred by him when he testified in court. In contrast, the specimen signatures in 'D' and 'E' as analysed by PW5 were not produced in court in order for the High Court to examine and verify what those specimen signatures looked like. The trial judge was not satisfied as to the manner in which PW5 gave evidence on her analysis. He found that she did not provide satisfactory evidence on 'the extent and nature of the variation' as was concluded in her report that the 'questioned signature may not have been written by the writer of the specimen' on account of the slight variations. In the words of the trial judge in para [103] of his judgment 'Since no evidence was produced as to what was in envelopes 'D' and 'E', it cannot be determined by this court as to how PW5 made the comparison to come to the conclusion that the signature in question may not be similar to the specimens'.

Corroboration by other witnesses

[110] In this respect, the trial judge took the view that the expert's evidence ought to be tested against the totality of other evidence, in particular that of the counsel Khor, whom, according to the trial judge is a disinterested witness, having actually witnessed the signing of the SSA by Henry (para [117] of his ground of judgment). Khor was regarded by the trial judge as one 'who is unlikely to concoct a fraudulent story as to the existence of the SSA as he accrued no interest under the said agreement nor was he paid for the preparation of the SSA'.

[111] Contrary to the above finding, the Court of Appeal took the view that 'Khor was hardly a disinterested witness' because he is a defendant in another suit filed by Henry, which is being tried at the same time. The Court of Appeal found the High Court in error when accepting Khor's evidence without giving much caution. In this regard, three QOLs ask as follows:

(a) QOL 5:
Whether the Court of Appeal was correct in law in holding that a witness will be deemed to be an interested witness merely because he was sued as a defendant?

(b) QOL 3 (Khor's case):
Whether the Court of Appeal was correct in law in holding that a witness will be deemed an interested witness merely because he/she is a party to the suit?

(c) QOL 4 (Khor's case):
In the absence of any finding of fraud, conspiracy or impropriety on the part of an attesting solicitor, is the court correct in law to consider the

attesting solicitor an interested witness solely for the reason that the attesting solicitor is made a party to the suit and thereby rejecting his/her evidence in totality?

INTERESTED WITNESS AND ITS WEIGHT OF EVIDENCE

[112] We shall deal with the above three questions pertaining to an interested witness together. The three QOLs, in effect, ask whether or not a 'defendant'; a 'party to the suit'; and an 'attesting solicitor' — are interested witnesses, and if so, how much weight, if at all, is to be attached to the evidence of such witnesses.

[113] Generally, at law, all persons shall be competent to testify unless they come under any of the exceptions in s 118 of the EA 1950. In all civil proceedings the parties to the suit shall be competent witnesses (s 120(1)). Thus, a plaintiff or a defendant is not, in as much as he/she is interested in the outcome of the case, to be regarded as an interested witness, merely on the label he/she is wearing as a party to the suit.

[114] There ought to be proof obtained through the examination of witnesses that a witness is an interested witness. One cannot be considered an interested witness merely on speculation based on his status as being a party to the suit, or the kind of relationship to any party to the suit. Even the 'testimony of close relation is not tainted if it is otherwise reliable in the sense that the witnesses and competent witnesses who were at the scene of the occurrence and could have seen what had happened. But if it is proved that they are not entirely disinterested witnesses, eg they are either partisans of the complainant or are in any way inimical to the accused, then their testimony is tainted and requires corroboration if to be acted upon' (*Liow Siow Long v Public Prosecutor* [1970] 1 MLJ 40 referred to by this court in *Magendran a/l Mohan v Public Prosecutor* [2011] 6 MLJ 1).

[115] In fact, even when a person is considered an interested witness in any capacity or to any extent, this court has been consistent in holding that 'there is no legal presumption that an interested witness should not be believed. He is entitled to credence until cogent reasons for disbelief can be advanced in the light of evidence to the contrary and the surrounding circumstances' (*Balasingham v Public Prosecutor* [1959] 1 MLJ 193 referred to by this court in *Dato' Seri Anwar bin Ibrahim v Public Prosecutor and another appeal* [2004] 3 MLJ 405; *Kumaran a/l Sappani v Public Prosecutor* [2012] 6 MLJ 153; *Wong Joo Sen v Public Prosecutor* [2011] 1 MLJ 581; *Suthakar a/l Sivakumar lwn Pendakwa Raya dan lain-lain rayuan* [2024] MLJU 2538).

[116] And when a person is found as an interested witness through the

testimony given that he/she has a grudge against the accused and has an own purpose to serve, such evidence is to be treated with caution and requires corroboration, particularly in a criminal case that rested entirely on circumstantial evidence (*Magendran a/l Mohan v Public Prosecutor* [2011] 6 MLJ 1). Any such 'testimonies are not to be rejected *in toto* as tainted without adequate justification, without meticulous scrutiny. The further circumstance that they are interested witnesses assumes a greater significance and it may not be prudent to base a conviction on their sole evidence without corroboration (per Raja Azlan Shah FJ in *Public Prosecutor v Datuk Haji Harun bin Haji Idris (No 2)* [1977] 1 MLJ 15 referred to by this court in *Puganeswaran a/l Ganesan & Ors v Public Prosecutor and other appeals* [2020] 12 MLJ 165).

[117] That said, a rejection of evidence of witnesses on ground of being interested witness alone is not justifiable, if evidence on record was otherwise trustworthy (*Munshi Prasad v State of Bihar* AIR 2001 SC 3031); or consistent and corroborated (*Abdul Rashid Abdul Rahman Patel v State of Maharashtra,* (2007) 9 SCC 1 (7). Thus, 'they may be related to each other but that does not mean and imply total rejection of the evidence: interested they may be but in the event they are so — it is the predominant duty of Court to be more careful in the matter of scrutiny of the evidence of these interested witnesses and if on such a scrutiny it is found that the evidence on record is otherwise trustworthy, question of rejection of the same on the ground of being interested witnesses would not arise. As noticed above, it is the totality of the evidence, which matters and if the same creates a confidence of acceptably (*sic*) of such an evidence, question of rejection on being ascribed as 'interested witness' would not be justifiable' (*Munshi Prasad v State of Bihar* AIR 2001 SC 3031).

[118] In some cases, the evidence of interested witness can be safely relied on and accepted without corroboration where his evidence had a ring of truth (*Jaisy v State Rep by Inspector of Police* AIR 2012 SC 478); or intrinsically good (*Ashok Rai v State of UP* AIR 2014 SC Supp 1007).

[119] In civil cases, a similar approach ought to be adopted that if the testimony of an interested witness 'was tainted then some form of corroboration was required in order for the court to act on it. It must be borne in mind that there is no legal presumption that the evidence of an interested witness is to be disbelieved. Eventually everything falls back on the court to decide whether his evidence is to be accepted or not' (*Tong Soon Tiong & Ors v FA Securities Sdn Bhd* [2013] MLJU 1585 (FC)).

[120] Hence, 'where the court is called upon to deal with the evidence of the interested witness, the approach of the court, while appreciating the evidence of such witnesses must not be pedantic. The court must be cautious in appreciating and accepting the evidence given by the interested witnesses but

the court must not be suspicious of such evidence. The primary endeavour of the court must be to look for consistency. The evidence of a witness cannot be ignored or thrown out solely because it comes from the mouth of a person who is closely related to the victim' (*Jayabalan v UT of Pondicherry* (2010) 1 SCC 199).

[121] As mentioned above, the trial judge in this case regarded Khor as an independent witness who had actually witnessed the signing of the SSA, and who accrued no interest under the agreement. On the other hand, the Court of Appeal considered Khor as an interested witness as he was a defendant in another suit; having being engaged by Gary; not having the SSA stamped until he was sued — that it was 'irrelevant whether Khor had anything to gain from taking Gary's side in the dispute between the brothers'.

[122] Having stated the principle of law related to an interested witness and having analysed the evidence presented to us, we are of the respectful view that the Court of Appeal had erred when holding Khor as 'hardly a disinterested witness' on the basis of being a party, or engaged by a party to the suit.

[123] Although in any case, a 'defendant' and a 'party to the suit' are both interested witnesses in the sense that he/she is interested in the outcome of the case, for him or against him, this does not mean ipso facto that his/her evidence must necessarily be rejected in totality. The authorities cited above are indicative that interested witnesses are credible whose evidence would be subjected to the usual process of examination. The duty of the court is to assess the credibility and reliability of their evidence in light of other evidence available. Hence, in the process of examination of witnesses where the court observed and so found a witness as interested or otherwise, the court is duty-bound to assess, examine and weigh such evidence in the like manner as that of any other witnesses. It is only at the end of such an exercise that the court may finally decide to reject or admit his evidence, either wholly or in part, with justifications.

[124] Having considered the facts and circumstances of these appeals and the reasonings upon which the courts below were premised upon, with respect, we find that the Court of Appeal had erred when it went on to hold Khor, the attesting solicitor who was also made a party to the suit, who testified on his past experiences and dealings with the two brothers on the preparation of the SSA; who was never found to have conspired or had committed fraud or impropriety; and who had nothing to gain in the matter to be an interested witness and consequently rejected Khor's evidence *in toto*. His evidence in respect of the existence of the SSA and of witnessing the signing of the same was relevant, to be assessed, not solely on its own, but with the totality of other independent evidence, both in the form of oral as well as documentary

evidence. In this regard, we are satisfied that the trial judge had meticulously and properly examined the evidence before him in the correct context. We defer to his findings with regards to his treatment of Khor's evidence. With respect, we find the rejection of Khor's evidence in the manner in which the Court of Appeal had done in these appeals to be erroneous and as such, could not be sustained.

[125] We therefore answer all the pertinent three QOLs in the negative.

THE WEIGHT OF EXPERT EVIDENCE — BETWEEN THE GOVERNMENT AND THE PRIVATE EXPERT

[126] As regards the issue that pertains to the expert evidence, the following two QOLs were granted leave:

(a) QOL 4:
Whether the Court of Appeal was correct in law to have preferred the evidence of a government expert as opposed to that of an expert witness from the private sector, merely because the expert witness was paid for his services by one of the parties and the government expert was not?

(b) QOL 2 (Khor's case):
Whether as a matter of law and policy, it is justiciable for the Court to accord less weight to the evidence of expert witnesses from the private sector (whose independence and expertise were not challenged) solely on the ground that they are paid by a party and instead accord more weight to the evidence of expert witnesses from the government department on the ground that they are not so paid.

[127] In essence, the two QOLs put into focus on the weight to be accorded to the evidence of expert witnesses — between that of the paid private expert and that of unpaid government expert. Before us, learned counsel for Henry had persistently argued that the two QOLs were premised on incorrect facts as the Court of Appeal did not prefer the evidence of PW5 to DW2 merely on the ground that DW2 was paid. Instead, the Court of Appeal had undertaken its own analysis of both expert witnesses' reports and their testimony in court in preferring PW5's to that of DW2.

[128] On this, learned counsel for Gary questioned the validity and credibility of the examination of signatures undertaken by the Court of Appeal merely by relying on the reports and the notes of evidence, without there being any hard evidence of specimens produced by PW5 in comparison to that presented by DW2. For Gary, it was argued that the 'paid' factor had influenced the mind of the Court of Appeal, as could be seen in para [142] of its judgment.

[129] We have carefully read and analysed the judgment of the Court of Appeal and having so analysed, we agree, that the Court of Appeal had not expressly stated that its preference of PW5 to DW2 was on the ground of the expert witness having been paid or not. The issue of paid or unpaid witness in para [142] was in fact one of the reasons forwarded by Henry when submitting on the issue of PW5 being a government chemist, a neutral party whose report was issued under s 399 of the Criminal Procedure Code ('the CPC') — such that her evidence ought to be accorded a greater weight as opposed to DW2, a paid expert witness called by Gary.

[130] Notwithstanding, we noted that the Court of Appeal did state matters which the trial judge had 'grossly overlooked', among others the fact that the report was prepared under s 399 of the CPC, and is therefore admissible; that she followed the SOP; that she was referred to as an independent witness by the trial judge; and that she examined the signature upon the request by the police, and not, by Henry — a reason, which the Court of Appeal accounted for 'the lack of a witness statement, the length of her report, the details contained therein; and what happened to the specimens examined'.

[131] In our view, what is more significantly relevant and pertinent to be determined on the question of the weight to be given to the evidence of both expert witnesses, is the fact that the Court of Appeal had, 'in any case, taken the task of examining the signatures,' and upon which it agreed 'with PW5 that the impugned signature is not Henry's', when in fact, PW5's report merely stated 'may not' have been written by the writer of the specimen — hence, the issue of the degree of certainty of the conclusion that PW5 had arrived at. Hence, the issue of conclusiveness of the opinion of PW5 as an expert.

[132] Briefly, the Court of Appeal held that PW5's report was clear and direct; that her methodology and process of examination was according to the standard operating procedure ('SOP'); that her testimony in court was comprehensive, clarifying, confident, crisp and sure; and that her findings were not challenged.

[133] As we understand it to be trite, that one of the important considerations for the examination of documents is the contemporaneous source, ie ten samples of signature from documents signed in the same year or one year before or after the impugned signature. In this case, the Court of Appeal found that specimens in envelope E as analysed by PW5 were contemporaneous as they were dated 2005 as compared to the 15 specimen analysed by DW2 which were from 2003, 2004, 2008 and 2011. The Court of Appeal found that the specimens for analysis by DW2 were not contemporaneous specimens and unsuitable or inappropriate for comparison.

[134] In this regard, if we are to consider the point of contemporaneous source, except for specimen E analysed by PW5 as stated in her report, all the other specimens analysed by both PW5 and DW2 are lacking in this respect because envelope D analysed by PW5 contains specimen in year 2008, and likewise the specimens analysed by DW2 as highlighted by the Court of Appeal. However, we noted that the major point of difference was that the specimens analysed by DW2 were taken from official documents and agreements and were not disputed by Henry.

[135] It is also crucial to note that the hard evidence was not presented by PW5 — a factor that had denied the trial judge of the opportunity to examine and 'determine what those specimens signatures looked like' in order to arrive at the conclusion as to whose evidence is to be preferred.

[136] We observed that the Court of Appeal, when analysing the evidence of both PW5 and DW2, did not show how it compared and contrasted their evidence — when justifying the acceptance of one over another, and how it was satisfied as to the consistency and confidence of a witness' evidence based on the written evidence.

[137] In any event, we take note that the trial judge had, at para [77] made a finding that the existence of the split agreement and that Henry had indeed put his signature on the SSA have been proved on the balance of probabilities, by assessing the testimony of Gary against those of Henry and Khor and other documentary evidence even 'without resorting to the experts' evidence (PW5 and DW2)'.

OUR VIEW

The evidence of expert

[138] Genuineness of handwriting is one of the matters where expert opinions are considered relevant facts (s 45 of the EA 1950), and thereby admissible. The role of an expert is to assist the court in understanding the matters within the sphere of his expertise, in order for the court to form its own opinion on the same. In *Pubalan a/l Peremal v Pendakwa Raya* [2020] 5 MLJ 442, Vernon Ong FCJ enunciated the following:

> An expert witness's overriding duty is to provide independent, impartial, and unbiased evidence to the court. The fact that the expert witness is called by one party does not detract from the overriding duty to the court. It is the duty of an expert witness to assist the court on the matters within his expertise. This duty overrides any obligation to the person from whom he has received instructions or by whom he is paid.

[139] Having had the assistance of an expert, the duty still lies with the court to make the ultimate finding on the disputed issue of fact. Such determination cannot be left entirely to the expert witness. This was what stated by Raja Azlan Shah, CJ (Malaya) in *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212 (FC) that:

> ... Our system of jurisprudence does not generally speaking, remit the determination of dispute to experts. Some questions are left to the robust good sense of a jury. Others are resolved by the conventional wisdom of a judge sitting alone. In the course of elucidating disputed questions, aids in the form of expert opinions are in appropriate cases placed before juries or judges. But, except on purely scientific issues, expert evidence is to be used by the court for the purpose of assisting rather than compelling the formulation of the ultimate judgments. In the ultimate analysis it is the tribunal of fact, whether it be a judge or jury, which is required to weigh all the evidence and determine the probabilities. It cannot transfer this task to the expert witness, the court must come to its own opinion.

(See also *Syed Abu Bakar bin Ahmad v Public Prosecutor* [1984] 2 MLJ 19.)

[140] And when expert opinion is admissible, it then becomes a question of value or weight to be attached to such evidence taking into consideration other facts and circumstances of the case. In *Junaidi bin Abdullah v Public Prosecutor* [1993] 3 MLJ 217, the Supreme Court made the following observations:

> ... But in the final analysis in a non-jury trial, it is for the trial judge himself as both judge of fact and law to determine the weight to be attached to such evidence notwithstanding the outstanding qualification or experience (or lack of it) of the expert.

[141] Similarly, Hashim Yeop Sani J (as he then was) in *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232 (FC) elaborated on the admissibility of an expert witness:

> If a witness is not skilled the judge will direct that his evidence be disregarded. But once it is determined that his evidence is admissible the rest is merely a question of value or weight which will be that which the court will attach to it as the court believes the witness to be peritus.

[142] However, when there exist opposing opinions between experts, the Court has the discretion to prefer one expert's opinion to the other. And the trial judge's preference of one expert's opinion to the other, is an aspect which the appellate court ought to have given considerable weight or deference, unless a clear error is manifested. In the Privy Council case of *Collector of Land Revenue v Alagappa Chettiar Collector Of Land Revenue v Ong Thye Eng and cross appeals* [1971] 1 MLJ 43, Lord Diplock has this to say:

> Where expert oral evidence of valuers has been called at the trial and disclosed a conflict of opinion between them, the judge's finding as to which he regarded as most reliable was entitled to considerable weight though it was less sacrosanct than

his findings of pure fact; a finding that the opinion of one expert witness was to be preferred to that of another, was also one which was not lightly to be disturbed by an appellate court unless it could be demonstrated that the judge who heard and saw them give their evidence had misunderstood it or that his reasons for preferring one to the other were clearly unsound.

[143] In this case, it would appear that PW5's report is just a page long as compared to DW2. Having so observed, we hasten to add that the length of a report is not, ipso facto or per se, by any stretch of imagination, the conclusive determining factor when faced with conflicting expert opinions. What matters is the reasoning and the explanation given as to how the experts had arrived at the respective conclusions as they did.

[144] That said, it will be an added value or weight to a report when it is prepared in full justification of the conclusion, accompanied with data and its explanation on the methodology applied. That will surely assist in the decision-making by the trial judge. In fact, a failure to provide sufficient reasons and data in coming to a finding of fact, may well warrant an appellate intervention.

[145] This is what the Supreme Court has held in *United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd* [1993] 1 MLJ 182, where it held that:

> The issue whether a signature on a document has been forged is a question of fact. It is eminently a matter for the trial court to determine after considering the credibility of the witnesses it has seen and heard and taking into account any expert evidence on the point. Of course, a trial judge is not entitled to abdicate his function by allowing the expert to determine the question. In this case, we are satisfied that the learned trial judge has not fallen into an error of this nature.
>
> ... In a civil case and more so in a criminal case, the evidence of an expert on handwriting unsupported by cogent data showing the process by which he came to his conclusion is not worth the paper on which it is written and any reliance upon such evidence would, in our judgment, constitute a serious misdirection warranting interference an appellate tribunal.

[146] In the appeals before us, one of the major reasons for accepting DW2 over PW5 by the trial judge has been the production of hard evidence, ie, the specimens used for comparison against the impugned signature. DW2 produced the samples while PW5 did not. Moreover, the documents from where the specimens were obtained and used for analysis by DW2 were not disputed by Henry. In our view, the satisfaction or otherwise of the trial judge in this respect ought to have been given due deference by the Court of Appeal as those reasons advanced by him were substantiated by evidence and his conclusion is therefore not plainly wrong.

[147] This is exactly what was stated in *Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai* [1997] 3 MLJ 61 where this court referred to the Supreme Court of India's decision in the case of *Murarilal v State of MP* AIR 1980 SC 531 at p 534 where it was held that:

> ... the science of identification of handwriting is not nearly so perfect and the risk is, therefore, higher. But that is a far cry from doubting the opinion of a handwriting expert as an invariable rule and insisting upon substantial corroboration in every case, howsoever the opinion may be backed by the soundest of reasons. It is hardly fair to an expert to view his opinion with an initial suspicion and to treat him as an inferior sort of witness ... His opinion has to be tested by the acceptability of the reasons given by him. An expert deposes and not decides. His duty is to furnish the judge with the necessary scientific criteria for testing the accuracy of his conclusion, so as to enable the judge to form his own independent judgment by the application of these criteria to the facts proved in evidence.
>
> ...
>
> We are firmly of the opinion that there is no rule of law, nor any rule of prudence which has crystallized into a rule of law, that opinion evidence of a handwriting expert must never be acted upon, unless substantially corroborated. But, having due regard to the imperfect nature of the science of identification of handwriting, the approach, as we indicated earlier, should be one of caution. Reasons for the opinion must be carefully probed and examined. All other relevant evidence must be considered. In appropriate cases, corroboration may be sought. In cases where the reasons for the opinion are convincing and there is no reliable evidence throwing a doubt, the uncorroborated testimony of a handwriting expert may be accepted. There cannot be any inflexible rule on a matter which, in the ultimate analysis, is no more than a question of testimonial weight.

[148] As such, although the court has the discretion to choose one expert's opinion over the other, preferring the evidence of a government expert as opposed to that of an expert witness from the private sector, merely because the latter expert witness was paid for his services by one of the parties, whereas the government expert was not, would not provide, in our respectful view, a valid or reasonable ground to premise a conclusion.

[149] In this respect therefore, we answer the two QOLs in the negative.

CONCLUSION

[150] Although an appeal is in principle, a rehearing, it must always be borne in mind that the appellate bench is at a distinct disadvantage for not having seen and heard the witnesses testifying — an advantage that only the trial judge has. And unless it can be shown that the trial judge 'has failed to use or has palpably misused his advantage, the higher court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of

the probabilities of the case. The course of the trial and the whole substance of the judgment must be looked at, and the matter does not depend on the question whether a witness has been cross-examined to credit or has been pronounced by the judge in terms to be unworthy of it. If his estimate of the man forms any substantial part of his reasons for his judgment the trial judge's conclusions of fact should, as I understand the decisions, be let alone' (per Lord Sumner in *Owners of Steamship Hontestroom; and Owners of Steamship Sagaporack. Owners of Steamship Hontestroom; and Owners of Steamship Durham Castle* [1927] AC 37 (HL)).

[151] Essentially, the reversal of the crucial findings of the learned High Court judge by the Court of Appeal had to do with its assessment of the evidence vis a vis witnesses' reliability and credibility. On this, we noted that 'where either story told in the witness-box may be true, where the probabilities and possibilities are evenly balanced and where the personal motives and interests of the parties cannot but affect their testimony, this House has always been reluctant to differ from the judge who has seen and heard the witnesses, unless it can be clearly shown that he has fallen into error' (per Lord Macmillan in *Powell and Wife; and Streatham Manor Nursing Home* [1935] AC 243).

[152] Having read and examined the judgments of the courts below and the records of appeals, and having read the written submissions and heard parties' oral submissions, we are of the unanimous view that the appellate intervention by the Court of Appeal in reversing the decisions of the trial court, is, with due respect, unwarranted. The trial judge did not act against the weight of evidence, nor did he plainly err in his appreciation and assessment of all the evidence adduced before him, which he had reasonably explained and justified. As such, the trial judge cannot be held to have been plainly wrong, and the Court of Appeal was therefore in error when it disturbed the findings of facts and the decisions of the trial judge.

[153] Having answered a total of nine QOLs above, we do not find it is necessary for us to answer the remaining three QOLs on: (a) sham agreement; (b) locus standi; and (c) the application of s 132C of the Companies Act 1965 and the *Duomatic* principle — which answers would not have any material bearing on the ultimate decisions of these appeals, as our determination on the SSA as agreed between the parties will effectively and finally dispose of these appeals. Lest we forget, all parties are in unison that the determination by us, one way or other, on the issues that pertain to the SSA must of necessity determine the outcome of these appeals.

[154] In the upshot therefore, we allow all the appeals, set aside the decisions of the Court of Appeal and affirm all the decisions of the High Court.

[155] Having heard all parties, we order costs in the following manner:

(a) costs to the appellants in cases No 23 and 25 as follows:

(i) leave to appeal before the Federal Court at RM75,000; and

(ii) main appeal at the Federal Court at RM750,000.

(b) costs to the appellants in cases No 24 and 26 as follows:

(i) leave to appeal before the Federal Court at RM75,000; and

(ii) main appeal at the Federal Court at RM250,000.

(c) common order for all appeals as follows:

(i) the order of the Court of Appeal on costs of RM100,000 is reversed in favour of the appellants;

(ii) para (vi) of the order of the Court of Appeal is maintained; and

(iii) the order of the High Court on costs of RM800,000 is reinstated in favour of the appellants (dated 25 July 2017),

All costs are subject to payment of allocatur fees.

[156] As regards the consequential order, we allow the prayers as prayed for, with variation, as follows:

(a) in respect of prayers No 1.2 and 1.3, Henry to execute the same within 14 days from today; and

(b) in respect of prayer No 1.6, the balance purchase price for the shares transfer due from Gary to Henry is deemed paid by setting off the costs of the main appeal in the sum of RM750,000 in favour of Gary against Henry.

All appeals allowed; decisions of Court of Appeal set aside; all decisions of High Court affirmed with costs.

Reported by Dzulqarnain Ab Fatar